(29)

No. 88-1597-CFX
Status: GRANTED

Docketed:
March 30, 1989

Title: Board of Education of the Westside Community Schools, etc., et al.Petitioners
v.
Bridget C. Mergens, by and through her next friend, Daniel N. Mergens, et al.

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Daubman,Allen E.

Counsel for respondent: Solicitor General, Sekulow,Jay Alan

Entry	Date	Note	Proceedings and Orders
1	Mar 30 1989	G	Petition for writ of certiorari filed.
3	Apr 26 1989		Order extending time to file response to petition until May 29, 1989.
5	Apr 28 1989		Brief amicus curiae of National School Boards Assn. filed.
6	May 10 1989		Brief of respondents Bridget Mergens, et al. in opposition filed.
4	May 11 1989		Brief amici curiae of Tara Lynn Burr, et al. filed.
7	May 16 1989		DISTRIBUTED. June 1, 1989
9	May 31 1989		Order further extending time to file response to petition until June 12, 1989.
10	Jun 2 1989		REDISTRIBUTED. June 8, 1989
12	Jun 12 1989	X	Brief of respondent United States in opposition filed.
13	Jun 13 1989		REDISTRIBUTED. June 29, 1989
14	Jun 23 1989	X	Reply brief of petitioners Board of Education of Westside Community, et al. filed.
15	Jul 3 1989		Petition GRANTED.
			**********
17	Jul 28 1989		Order extending time to file brief of petitioner on the merits until September 2, 1989.
18	Aug 24 1989		Record filed.
		*	8 vol.-USCA 8
19	Sep 1 1989		Joint appendix filed.
20	Sep 1 1989		Brief of petitioners Board of Education of Westside Community Schools, et al. filed.
22	Sep 1 1989		Brief amicus curiae of National School Boards Association filed.
23	Sep 1 1989		Brief amici curiae of Anti-Defamation League of B'Nai B'Rith, et al. filed.
24	Sep 1 1989		Brief amici curiae of American Jewish Committee, et al. filed.
21	Sep 2 1989		Brief amicus curiae of People for the American Way filed.
25	Sep 19 1989	G	Motion of the Solicitor General for divided argument filed.
28	Sep 21 1989		Order extending time to file brief of respondent on the merits until October 26, 1989.
26	Sep 26 1989		Brief amicus curiae of Concerned Women for America filed.
29	Sep 28 1989		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
30	Sep 29 1989		Brief amici curiae of Rutherford Institute, et al. filed.
31	Oct 2 1989		Brief amicus curiae of United States Catholic Conference

No. 88-1597-CFX

Entry	Date	Note	Proceedings and Orders
			filed.
32	Oct 3 1989		Record filed.
		*	Certified copy of original record, 3 volumes, received.
33	Oct 23 1989		Brief amicus curiae of Dr. David Moshman filed.
34	Oct 23 1989		Brief amici curiae of Specialty Research Associates, et al. filed.
35	Oct 23 1989		Brief amicus curiae of Richard Collin Mangrum filed.
36	Oct 24 1989		Brief of respondents Bridget Mergens, et al. filed.
41	Oct 24 1989		Brief amicus curiae of Campus Crusade for Christ, Inc. filed.
43	Oct 25 1989		Brief amicus curiae of Christian Advocates Serving Evangelism filed.
37	Oct 26 1989		Brief amici curiae of Baptist Joint Committee on Public Affairs, et al. filed.
38	Oct 26 1989		Brief amici curiae of Tara Lynn Burr, et al. filed.
39	Oct 26 1989		Brief amicus curiae of Knights of Columbus filed.
40	Oct 26 1989		Brief of United States filed.
42	Oct 26 1989		Brief amicus curiae of Southern Center for Law & Ethics filed.
44	Nov 13 1989		Motion of the Solicitor General for divided argument GRANTED.
45	Nov 14 1989	G	Application (A89-369) to extend the time to file a reply brief from November 27, 1989 to December 1, 1989, submitted to Justice Blackmun.
46	Nov 15 1989		Application (A89-369) granted by Justice Blackmun extending the time to file until December 1, 1989.
47	Nov 27 1989		SET FOR ARGUMENT TUESDAY, JANUARY 9, 1990. (1ST CASE)
48	Nov 30 1989		CIRCULATED.
50	Dec 4 1989	X	Reply brief of petitioners Board of Ed. Westside, et al. filed.
		*	Motion for leave to file reply brief pending.
49	Dec 7 1989	G	Motion of petitioner for leave to file a reply brief, out-of-time, filed.
51	Jan 8 1990		Motion of petitioner for leave to file a reply brief, out-of-time, GRANTED.
52	Jan 9 1990		ARGUED.

88-1502 (1)

Supreme Court, U.S.
FILED
MAR 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Questions Presented

The Equal Access Act, 20 U.S.C. §4071 et. seq. (1988) prohibits federally funded secondary schools sanctioning "noncurriculum related" student initiated "meetings" from discriminating on the basis of the content of speech against other student initiated "meetings." The questions presented are:

1. Whether, by requiring schools which officially sponsor co-curricular student clubs to officially sponsor student religious meetings, the Act unconstitutionally establishes religion, particularly when enforced against a school which permits informal religious meetings, but refuses to grant them official sanction.

2. Whether, for purposes of the Act or the Free Speech Clause, certain types of student "meetings" are necessarily "noncurriculum related," and thus create a limited open forum, notwithstanding a determination by school officials that those "meetings" are curriculum related, and that only curriculum related activities will be permitted.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings . . . ii

Table of Contents iii

Table of Authorities v

Jurisdiction 2

Opinions Below 3

Constitutional and Statutory Provisions. 3

Statement of the Case 3

WHS Co-Curricular Program. . . . 3

The Christian Bible Club's Application 5

This Law Suit. 7

The District Court's Opinion . . 13

The Court of Appeals' Opinion . . 15

Reasons for Granting the Writ . . 17

I. The Court Should Resolve the Constitutionality of the Equal Access Act 17

II. The Court Should Decide What Constitutes A Noncurriculum Releated Meeting for Purposes of Act 24

Conclusion 32

Appendices:

Decision and Judgment of the United States Court of Appeals for the Eighth Circuit, No. 88-1227, (February 8, 1989) A-1

Decision of the United States District Court for the District of Nebraska, CV-85-0-426 (February 2, 1988)) B-1

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071 et. seq. C-1

Table of Authorities

Cases

Amidei v. Spring Branch Ind. School Dist., C/A H-84-4673, (S.D. Tex. 1985). 21

Bell v. Little Axe Independent School District, 766 F.2d 1391, (10th Cir. 1985). 18, 23

Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Pa. 1983), rev'd, 741 F.2d 538, (3d. Cir. 1984), rev'd on other grounds, 475 U.S. 534 (1986). . . . 8, 17, 18, 19, 23

Brandon v. Board of Education, 635 F.2d 971 (2d. Cir. 1980), cert. denied, 454 U.S. 1123, (1981) 18, 20, 23

Buffalo Board of Educ. v. Barr, C/A 88-1306A (W.D.N.Y. 1988), petition for writ of mandamus pending, (2d Cir. 1989) . . 21

Clark v. Dallas Independent School District, 671 F.Supp. 119, (N.D. Tex. 1987), on reconsideration, 701 F. Supp. 594, (N.D. Texas 1988), app. pending, 88-1681 (5th Cir. 1989) . . 18, 20

Clergy and Laity Concerned v. Chicago Board of Education, 586 F.Supp. 1408, (N.D. Ill. 1984). 18

Edwards v. Aguillard, 107 S.Ct. 2573 (1987) . . . 19

Garnett v. Renton Area School District, 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending 21, 30

Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988) . . . 14, 22

Hunt v. Board of Educ., 321 F.Supp. 1263, (S.D.Wa.Va. 1971) 18

Johnson v. Huntington Beach
Union H.S. Dist.,
68 Cal. App. 3d 1,
137 Cal. Rptr. 43 ( ),
cert. denied,
434 U.S. 877 (1977) . . . 18

Lubbock Civil Liberties,
Union v. Lubbock Independent,
School District,
669 F.2d 1038,
(5th Cir. 1982),
cert. denied,
459 U.S. 1159 (1983) . . . 18, 23

McCollum v.
Board of Education,
331 U.S. 1 (1948) 19

Mesa v. California,
57 U.S.L.W. 4199 (1989) . . 30

Mississippi College for
Women v. Hogan,
458 U.S. 718 (1982) . . . 20

Nartowicz v. Clayton County
School District,
736 F.2d 646,
(11th Cir. 1984) 18

Perry Educational Association
v. Perry Local Educators
Association,
460 U.S. 37 (1983) 13

Perumal v. Saddleback Valley School District, 198 Cal. App. 3d 64, 243 Cal. Rptr. 545 ( ), cert. denied, 109 S.Ct. 327 (1988) . . . 21

Trietly v. Board of Education, 65 A.D. 2d 1, 409 NYS 2d 912, (4th Dept. 1978) 18

Widmar v. Vincent, 454 U.S. 263 (1981) . . . 13, 16, 17, 18

CONSTITUTIONS AND STATUTES

U.S. Const., Amend. I . . . passim

Equal Access Act, 20 U.S.C. §4071 et. seq. (1988) . . . . . passim

28 U.S.C. §1254(1). 2

28 U.S.C. §1331 2

28 U.S.C. §1343 2

28 U.S.C. §1344 2

28 U.S.C. §2403(a). 7

OTHER AUTHORITIES

69 Md. Opinion Attorney General _ (1984) 22

Letter, J. Sietsema, CCD Coordinator of National, Center for Education Statistics, (March 2, 1989) 29

Memorandum of December 12, 1989 from Robert Stone, Deputy Commissioner of New York State Education Department . . . 20

Religious Speech Protection Act: Hearings on H.R. 4996 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee of Education and Labor, 98th Cong. 1st Sess. 46, 124 (1984) 22

130 Cong. Rec. S. 8341 (daily ed. June 27, 1984), (remarks of Senator Leahy) . 25

130 Cong. Rec. S. 8342, (daily ed. June 27, 1984), (remarks of Senators Hatfield and Gorton) 25, 27

130 Cong. Rec. S. 8357,
(daily ed. June 27, 1984),
(remarks of Senator
Durenberger) 26

130 Cong. Rec. S. 8358,
(daily ed. June 27, 1984),
(remarks of Senator Biden) . 27

130 Cong. Rec. H. 7732
(daily ed. July 25, 1984),
(remarks of Representative
Goodling) 26, 28

No. 88-___

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

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Respondent.

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by

and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents.

Petition For A Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petitioners, Board of Education of the Westside Community Schools and several of its officials, respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit, entered on February 8, 1989.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§1331, 1343 and 1344.

Opinions Below

The opinion of the Court of Appeals for the Eighth Circuit is reported at 867 F.2d 1076, and is reprinted as Appendix A. The memorandum decision of the United States District of Nebraska is not reported, but is reprinted as Appendix B.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071-4074 is reprinted as Appendix C.

STATEMENT OF THE CASE

WHS Co-Curricular Program

Westside High School ("WHS") had an extensive and long-standing program of officially sanctioned after-school

student activities or clubs. Each of these activities was intended to, and, in the opinion of school officials, did, directly further the educational mission of the school. Each student activity or club was directed, controlled or supervised by a member of the school faculty or administration. These faculty members received extra compensation from the school district.

Official approval carried with it access to school facilities, including the bulletin board, public address system, and school year book. Recognized clubs aggressively recruited new members at an annual school-sponsored Club Fair, which took place during the regular school day.

Administrative approval of a proposed club depended on student interest, availability of financing and facilities, and compatibility with WHS'

educational mission. Only a few requests for sanction (which might originate with students, faculty, or administrators) had ever been denied. With some few exceptions, participation in co-curricular activities did not affect a student's grades.

The Christian Bible Club's Application

In January, 1985, Bridget Mergens, then a WHS senior, approached principal James Findley to obtain formal recognition of a "Christian Bible Club." With the knowledge of school officials but without their official approval, Ms. Mergens and other students had been meeting informally for religious speech for some time when the request was made.

The proposed club was to be "non-denominational," open to students regardless of creed, and was to provide Christian "fellowship" and a vehicle for proselytizing those who had not yet

"accepted" Christ. Mergens was willing to forego a school sponsor, and accept a school monitor, whose only responsibility would be to ensure order at club meetings.

Findley told Mergens that WHS could not sanction the proposed Christian Bible Club because it did not comply with School Board Policy 5610 [B-19-20], and because of the school district's concern that sanctioning a Christian Bible Club would violate the Establishment Clause. He told Mergens that the school had no objection to the continuation of the group's informal meetings.[1] Kenneth K. Hansen (then Superintendent of Schools) and James A. Tangdall (then Associate Superintendent of Schools) approved that decision. Mergens and her

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[1] He also suggested that meetings take place at a next-door church, and offered to intervene with church officials on behalf of the students.

attorney appealed to the Board of Education, which ratified the decision of the school administrators.

This Law Suit

In April, 1985, Mergens and several other WHS students filed suit asserting that the refusal to sanction the proposed Christian Bible Club violated the First Amendment, the Equal Access Act ("the Act"), and various state laws.

Because it thought the Board's constitutional challenge to the Act substantantial, the District Court, in May, 1985, denied plaintiffs' motion for a preliminary injunction requiring WHS to grant the Christian Bible Club recognition under the Act. In August of that year, the United States intervened pursuant to 28 U.S.C. §2403(a) to defend the Act's constitutionality. Plaintiffs unsuccessfully moved for summary judgment in October, 1985. Trial was delayed

while this Court considered Bender v. Williamsport Area School District, 475 U.S. 534 (1986).

The parties stipulated that WHS received federal funds. Of approximately thirty student activities, plaintiffs singled out ten as being noncurriculum related.[2] In addition, the parties stipulated that the Christian Bible Club sought all privileges enjoyed by other student activities, other than the "right" to a school paid and selected "sponsor" to direct its activities.

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[2] The clubs were:

Interact	Welcome to Westside
Chess	Future Business Leaders of America
Subsurfers	Zonta
National Honor Society	Student Advisory Board
Photography	Student Forum

At the time the case was tried, photography was a formal class and not a club. Photography was previously offered as a club because there was no State certified photography teacher available.

The four day trial explored several issues at length: the justifications for denying the Christian Bible Club official sanction; the relation of the activities program at WHS in general; and the ten clubs singled out in the stipulation in particular, to the curriculum; the possibility that students would perceive recognition of the Christian Bible Club as official approval of its religious program; and the handling of controversial issues within the WHS curriculum.

School administrators testified that each and every student activity was required to, and did, advance the educational mission of the school. Sponsors were required to actively guide a club's activities. The degree of involvement by the sponsors varied from club to club, depending upon such things as the degree of activity of the club and

organizational skills of student participants. All club activities were under the direct supervision of an assistant principal, to whom the faculty sponsors were accountable for the activities, goals and objectives of their clubs.

Although student plaintiffs testified that clubs were not related to the curriculum, the principal, assistant principal in charge of student activities, and associate superintendent of schools testified at length that all student activities were curriculum related and offered specific justifications for their conclusions.[3] They also testified that school officials

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[3] These officials testified as follows as to the curriculum relatedness of the stipulated clubs:

National Honor Society, Welcome to Westside; Student Advisory Board, Student Forum. All were said to further the teaching of good citizenship, an overarching mission of WHS. The Student Advisory Board and Student Forum together formed

would have no way to guarantee that the Christian Bible Club would objectively explore all sides of controversial issues, as all other classes and activities were required to do.

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the student government and reinforced the government course. The National Honor Society promoted academic achievement generally. Welcome to Westside helped integrate new students into the school.

Future-Business Leaders of America; Subsurfers; Chess. WHS offered an extensive program of business courses. FBLA supplemented these offerings with practical lectures by businesspersons, as well as opportunities for students to operate their own enterprises and participate in an annual state convention. Chess was said to strengthen logic and reasoning skills. Teachers in the mathematics department actively encouraged chess in the mathematics resource room during the school day. Because of occasional disruption of students using the resource room for other purposes, the chess activity was converted to a club.

Interact and Zonta were service clubs which provided hands on community service activities. Each promoted service to the community. Those service projects could be used for extra-credit in certain courses. At various times, community service was required in one or more courses. Teaching the value of community service is an important part of the WHS curriculum.

Plaintiffs' curriculum expert, Dr. Ward Sybouts, testified that some theorists broadly defined curriculum to include all classes, programs and activities offered by a school, while others asserted a narrower definition. Dr. Sybouts gave his opinion that school activities programs, including student clubs, constitute part of the curriculum.

Dr. David Moshman, plaintiffs' child development expert (contradicted on this point by the "hands-on" experience of WHS school officials, all of whom had decades of experience in secondary schools), testified that by twelve years of age, children are generally capable of distinguishing between school sponsored and school tolerated activities. Dr. Moshman admitted, however, that not all children developed this capacity at the same age, that the capacity for making such distinctions generally increases

with age and experience, and that the abstract reasoning skills necessary to making such a distinction become more fully developed and consistently applied in college age students.

The District Court's Opinion

The United States District Court for the District of Nebraska entered judgment for the Board. It identified the core statutory issue as whether WHS intended to create a limited open forum. To answer that question, the Court turned to Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983) which, together with the earlier decision in Widmar v. Vincent, 454 U.S. 263 (1981) provided the theoretical underpinnings of the Equal Access Act. Perry held that government must intentionally dedicate a place to unfettered debate before it becomes a limited public forum.

Applying this standard, the Court found that the School Board had not created a limited public forum in its student activities program [B-26-27]:

> [T]hose clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution. The club system plan at WHS differs dramatically from those found to create an open forum policy in Widmar and Bender.

The District Court also held that the Board's refusal to sanction the Christian Bible Club, although restrictive of speech, did not violate the students' freedom of speech, because, it was "reasonably related to [the] legitimate pedological concern," Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 571 (1988), that all sanctioned school activities present balanced views on controversial issues, a policy enforced with respect to both curricular

and co-curricular activities. The reasonableness of the restriction was underscored because WHS students were free to engage in non-sanctioned religious associational activities on school premises.

The Court of Appeals' Opinion

The Eighth Circuit reversed, rejecting the District Court's interpretation of the phrase "noncurriculum related". Without explaining which clubs (other than the chess club) were "noncurriculum related" or offering any justification for rejecting the school officials' explanation of curriculum relatedness, the Court found that "many of the student clubs at WHS, including the chess club, are 'noncurriculum related'" [A-14].

The Court cited excerpts of the Act's legislative history suggesting that the definition of "noncurriculum related" meetings was intended by Congress to be

"fairly broad." The broad definition of curriculum relatedness urged by school officials would, the Court wrote, allow the Act to be overturned by administrative fiat [A-14-15].

The Eighth Circuit also rejected the Board's argument that the Act unconstitutionally established religion [A-19-20]. It noted that the Act tracked Widmar v. Vincent, 454 U.S. 263 (1981), and that the only question was whether high school students, were as capable as college students, of distinguishing school sponsored from school tolerated activities. The Court found no legally relevant difference between the two [A-20]:

> because Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding. . . .
>
> Indeed even if Congress had never passed the EAA, our

> decision would be the same under Widmar alone.[4] (footnote omitted).

The Court did not take note of the reservation of this question in Widmar, 454 U.S. at 274, n. 14.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE THE CONSTITUTIONALITY OF THE EQUAL ACCESS ACT

Once before, this Court was persuaded that the question of whether student religious clubs may compel school authorities to grant them official recognition was sufficiently important to merit plenary review. Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986).

When certiorari was granted in Bender, there already existed substantial

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[4] All but one of the original plaintiffs had graduated by the time the case reached the Eighth Circuit. Plaintiffs' counsel sought leave before argument in the Court of Appeals to add additional plaintiffs who will not graduate for several years. That motion was still pending as of the date of the writing of this Petition.

conflict in the lower courts on this issue[5], both in theory and result, arising in turn from a clash between this Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), upholding the free speech right of college students to meet in empty college classrooms to pray and

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[5] In addition to Bender v. Williamsport Area School Dist. 563 F.Supp. 697 (M.D. Pa. 1983) (recognition constitutionally required), rev'd, 741 F.2d 538 (3d Cir. 1984) (unconstitutional to grant recognition), rev'd on other grounds, 475 U.S. 534 (1986); Bell v. Little Axe Ind. School Dist., 766 F.2d 1391 (10th Cir. 1985) (unconstitutional to grant recognition); Nartowicz v. Clayton County School Dist., 736 F.2d 646 (11th Cir. 1984) (same); Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, reh. denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 459 U.S. 1159 (1983) (same); Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) (same); Hunt v. Board of Educ., 321 F.Supp. 1263 (S.D.W.Va. 1971) (same); Trietly v. Board of Educ., 65 A.D.2d 1, 409 N.Y.S.2d 912 (4th Dept. 1978) (same); Johnson v. Huntington Beach Union H.S. Dist. 68, Cal. App. 3d 1, 137 Cal. Rptr. 43, cert. denied, 434 U.S. 877 (1977) (same); Contra, Clergy and Laity Concerned v. Chicago Bd. of Educ., 586 F.Supp. 1408 (N.D. Ill. 1984) (recognition constitutionally required).

study the Bible, and the demands of the Establishment Clause, requiring, again under this Court's cases, a high wall of separation between church and state in public secondary schools. Edwards v. Aguillard, 107 S.Ct. 2573 (1987); McCollum v. Board of Educ., 333 U.S. 1 (1948).

That conflict has intensified since Bender. First, notwithstanding numerous decisions holding that public school officials could not, consistent with the Establishment Clause, sanction student religious clubs, Congress adopted the Equal Access Act which purported to require just that result.

The Establishment Clause question raised in this petition must be answered whether the claim of a student religious club arises directly under the Constitution's Free Speech Clause, or, since Congress may not authorize an unconstitu-

tional result by statute, Mississippi College for Women v. Hogan, 458 U.S. 718 (1982), under the Act. Nevertheless, because the Act was enacted in the face -- indeed, with the purpose of superseding -- decisions holding "equal access" unconstitutional, it is appropriate that it be answered in a case arising under the Act.

School districts in judicial circuits which had ruled that school officials may not constitutionally permit religious clubs are now caught between the conflicting commands of the federal judicial and legislative branches.[6] Officials in other districts must guess

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[6] The Dallas School Board has determined on advice of counsel that it is bound by the Fifth Circuit's decision in Lubbock, not the Act. See, Clark v. Dallas I.S.D., 671 F.Supp. 1119 (N.D. Tex. 1987), app. pending, 88-1681 (5th Cir. 1989). The New York State Education Department, by contrast, has advised schools in New York to abide by the Act, and not the contrary decision of the Second Circuit in Brandon, supra. See,

which authority to follow -- at peril of being sued with the attendant disruption and expense whatever they decide -- a task complicated by the fact that the judiciary has not spoken with one voice, as the divergent results on the Establishment Clause in this case and Garnett v. Renton Area School District 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending, illustrate.[7]

Second, as to claims for equal access directly under the Free Speech Clause, this Court has, since Widmar, refined its public forum analysis

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Memorandum of December 12, 1989 from Robert Stone, Deputy Commissioner to Superintendents of Schools. (A copy is on file with the Clerk of the Court). Cf. Buffalo Board of Educ. v. Burr, C/A 88-1306A (W.D.N.Y., 1988), petition for writ of mandamus pending (2d Cir. 1989).

7 See also Perumal v. Saddleback Valley School Dist., 198 Cal. App. 3d. 64, 243 Cal. Rptr. 545, cert. denied, 109 S.Ct. 327 (1988) (unconstitutional to permit equal access); Amidei v. Spring Branch Ind. School Dist., C/A H-84-4673 (S.D. Tex. 1985) (Act constitutional).

substantially. Because the constitutional claims made by the students here (and elsewhere) for recognition of their Christian Bible Club are bottomed on the existence of a limited public forum, those refinements have a substantial impact on such claims.

The Eighth Circuit's unstated assumption here (as in Hazelwood School Dist. v. Kuhlmeir, 108 S.Ct. 562 (1988)), is that the bare presence of a multiplicity of voices evidences the existence of a limited public forum. As Hazelwood establishes, however, where school officials zealously limit access

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The Maryland Attorney General concluded that the Act was unconstitutional, 69 Md. O.A.G. ___ (1984). Leading constitutional scholars have likewise expressed divergent views, Religious Speech Protection Act: Hearings on H.R. 4996 Before the Subcommittee on Elementary, Secondary and Vocational Education of the House Committee on Education and Labor, 98th Cong., 1st Sess. (1984) at 46 (statement of Professor L. Tribe); id. at 124 (letter of Dean N. Redlich).

to the forum to those meeting certain standards, and carefully monitor speech to ensure that it achieves balance, a limited public forum does not exist.

On the issue of whether an extensive co-curricular program creates a limited public forum, the lower courts are badly split. The Second Circuit in Brandon v. Board of Educ., supra, and the Fifth in Lubbock Civil Liberties Union v. Lubbock L.S.D., supra, have concluded that a co-curricular program does not create a limited public forum, while (in addition to the decision below) the Third and Tenth have reached the opposite conclusion in, respectively, Bender v. Williamsport Area School Dist., supra, and Bell v. Little Axe Independent School District, supra.

The confusion over the constitutionality of the student religious clubs has spawned much litigation, endless public

controversy, bred disrespect for political and legal institutions which interpret the Constitution in diametrically opposite ways, and has diverted school officials' attention from more pressing educational issues. This Court should grant certiorari to resolve the important constitutional questions presented.

II. THE COURT SHOULD DECIDE WHAT CONSTITUTES A NONCURRICULUM RELATED MEETING FOR PURPOSES OF THE ACT

The Equal Access Act intrudes on the authority of educators to determine what student activities they will sanction. Since the Act's non-discrimination requirement is triggered only when a school allows "noncurriculum related" clubs to meet, how great that intrusion depends on how much discretion Congress accorded school officials to define what activities were "curriculum related."

Although Congress defined many other terms used in the Act, 20 U.S.C. §4072, it did not define the term "noncurriculum related", except for an oblique (and circular) reference to meetings "not directly related to the school curriculum," 20 U.S.C. §4072(c).

The legislative history is of some help, but is hardly conclusive; indeed, it points in several different directions at once. As the District Court noted (but the Court of Appeals overlooked), the limited public forum cases provided the blueprint for the Act. The legislative history is replete with references to this Court's holding that limited public forums are called into existence only by an intention to open a place to unfettered speech.[8] It was therefore

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[8] See e.g. 130 Cong. Rec. S. 8341 (daily edition, June 27, 1984) (remarks of Senator Leahy); 130 Cong. Rec. S. 8342 (daily edition, June 27, 1984) (remarks

reasonable for the District Court to interpret the Act in line with these cases.

Elsewhere in the course of debate, supporters of the bill suggested that certain named student clubs were "curriculum related" (French, football and cheer-leading being common examples) or "noncurriculum related" (chess clubs being the most common example). These statements, which use a laundry list approach to the interpretation of the Act, support the ruling of the Court of Appeals, but they were typically accompanied by a reminder (never discussed by the court below) that no hard and fast

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of Senator Gorten); 130 Cong. Rec. S. 8357 (daily edition, June 27, 1984) (remarks of Senator Durenberger); 130 Cong. Rec. H. 7732 (daily edition, July 25, 1984) (remarks of Representative Goodling).

Because of a contract dispute, the full edition of the Cogressional Record for 1984 is not available; hence the citations to the daily edition.

rule was possible, since each case would depend on the scope of a school's curriculum.[9]

In the Senate, Senator Hatfield, the prime sponsor of the bill which ultimately became the Act, proposed a test which went beyond a legislative enumeration of "curriculum related" groups. He suggested that "curriculum related" meant an activity which helped, or reinforced, formal course work. However, he noted that, even under his test, school officials would retain "full authority to determine where the line is to be drawn between 'curriculum-related' activities and 'noncurriculum related' ones."[10]

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9 See, e.g. 130 Cong. Rec. S. 8342 (daily edition, June 27, 1984) (remarks of Senator Hatfield); 130 Cong. Rec. S. 8358 (daily edition, June 27, 1984) (remarks of Senator Biden).

10 130 Cong. Rec. S. 8342 (daily ed. June 27, 1984) (remarks of Senators Hatfield and Gorton).

Some in the House of Representatives took a different tack. A key supporter of the bill suggested a two part inquiry to determine whether a meeting was curriculum related: (1) "is the subject matter of the meeting of a type which a public school could sponsor" and (2) "does the school or a school teacher require or directly encourage student participation in such group in connection with curriculum course work."[11]

These different approaches in the legislative history are reflected in the conflicting decisions in this case and Garnett. In this case, the Eighth Circuit emphasized that the Act embodied a "broad definition" of "noncurriculum related," and that some clubs were per se "noncurricular related." It believed such a reading was necessary to give full

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[11] 130 Cong. Rec. H. 7732 (daily ed. July 25, 1984) (remarks of Rep. Goodling).

effect to the rights guaranteed students under the Act. The Court rejected good faith explanations of the "curriculum-relatedness" of WHS' student activities program.

The Eighth Circuit's analysis does not adequately respect the autonomy of local school districts. If accepted, it would bind more than 17,000 secondary schools[12] (as defined by state law)[13] in the United States (probably all or most of which accept federal funds) which have a student activity program, to a rigid and narrow definition of curriculum by supposed Congressional fiat.

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12 Letter from J. Sietsema, CCD Coordinator of National Center For Education Statistics to Ron Lebovitz (March 2, 1989). A copy of the letter is on file with the Clerk of this Court.

13 Under the Act, the definition of secondary schools is to be determined under state law, 20 U.S.C. §4072(1), which, in Nebraska, is defined as seventh through twelfth grade.

By contrast, the Ninth Circuit in Garnett, supra, finding the clubs there to be "curriculum related," emphasized the discretion afforded school officials to determine the line between curriculum related and "noncurriculum related" meetings, but does so at the expense of rights students can plausibly (but we think ultimately incorrectly) claim under the Act.

The resolution of the conflict in statutory interpretation between the Eighth and Ninth Circuits as to the interpretation of the Act, without more, merits review in this Court. Review of this conflict might have the additional virtue of obviating the need for a decision preferring one constitutional right over another.[14]

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[14] Cf. Mesa v. California, 57 U.S.L.W. 4199, 4204 (1989).

But even without regard to the inter-circuit conflict, and without regard to the desirability of avoiding unnecessary constitutional decisions, review here is appropriate lest a vaguely worded federal statute, with a complex and confusing legislative history, cause school officials to needlessly eliminate otherwise valuable co-curricular programming in order to guarantee a closed forum. That will be the inevitable result if, because of the uncertainty of the statute's scope, school officials cannot be certain that maintaining traditional co-curricular programs sponsored by public secondary schools will not inadvertently result in the creation of a limited open forum.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 27, 1989

APPENDIX A

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1227

Bridget C. Mergens, by & through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by & through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by & through his next friends, Robert W. & Sherry K. Rensing; David K. Harris, by & through his next friends Kenneth & Myra Harris, and Andrea Simmons, by & through her next friends, Robert L. & Linda L. Simmons,	*	Appeal from the United States District Court for the District of Nebraska
Appellants	*	
United States of America Intervenor-Plaintiff Below.	*	
Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and	*	

Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends Kenneth Harris and Myra Harris; Kevin Brown, etc. by and through his next of friends Robert W. Rensing and Sherry K. Rensing,	*
Appellants,	*
v.	*
The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; & Kenneth K. Hansen, Superintendent of the Westside Community School District,	*
Appellees.	*

Submitted: October 17, 1988

Filed: February 8, 1989

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

McMILLIAN, Circuit Judge.

Appellants, students who attend Westside High School, a public school, appeal from a final judgment entered in the District Court for the District of Nebraska. The case was tried to the court. The district court held that the formation of a Christian Bible Study Club at Westside High School in Omaha, Nebraska, would violate the establishment clause of the first amendment.

For reversal, appellants argue that (1) Westside High School maintains an open forum, (2) the Equal Access Act, 20

U.S.C. § 4071-4074 (1984) (EAA), is constitutional and should be applied to this case, and (3) the actions of the Westside High School administration violate the first and fourteenth amendments. For the reasons discussed below, we reverse the judgment of the district court.

Westside High School (WHS) is a part of the Westside Community School system, an independent public school district, in Omaha, Nebraska. The school is controlled by appellee, the Board of Education of the Westside Community Schools (School Board). As a public school, WHS receives federal funds.

WHS students are allowed to become members of various student groups and clubs, all of which meet after school hours on school grounds. The students may choose from approximately thirty

different groups and clubs on a strictly voluntary basis. All of the clubs have faculty sponsors.

Board Policy 5610 recognizes these student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." There is no written school board policy concerning the formation of clubs. Rather, students wishing to form a club present their goals and objectives to a school official who analyzes the stated goals and objectives and decides whether or not the proposed club is consistent with Board Policy 5610. Until appellants attempted to form a Christian Bible Study club in January 1985, no club had ever been denied access to the school.

Appellants first presented their idea for a Christian Bible Study Club to Dr. Findley, the principal of WHS. Dr. Findley denied their request. Again in February 1985, appellants presented their request to Dr. Findley and Dr. Tangdall, associate superintendent of schools for the Westside Community Schools. At that time the request was discussed with Kenneth Hansen, superintendent of schools for the Westside Community Schools. The three school officials agreed that appellants' request should be denied on the basis that allowing such a club would violate the establishment clause of the first amendment.

On March 4, 1985, appellants petitioned the School Board to approve their request to form a Christian Bible Study Club. Appellants stressed to the

Board that they were not requesting a faculty sponsor unless required by school policy. If one were required, appellants asserted that the faculty sponsor would only be needed for custodial purposes. The School Board denied appellants' request stating that the proposed club would not be consistent with Board policy which permits school buildings to be used only for school-sponsored, curriculum-related activities.

In April 1985 appellants brought suit in the District Court for the District of Nebraska alleging that their freedom of speech, freedom of assembly and association, and freedom to exercise religion had been violated by the School Board and its employees in violation of the first and fourteenth amendments,

Article I of the Nebraska Constitution, and the Equal Access Act, 20 U.S.C. § 4071-4074.

On February 2, 1988, the district court entered judgment in favor of appellees. The court held that WHS maintains a closed forum and that therefore the Equal Access Act does not apply to WHS. Bridget Mergens, et al. v. The Board of Education of the Westside Community Schools, et al., No. CV 85-O-426, slip op. at 13 (D. Neb. Feb. 2, 1988). The court further held that the actions of WHS officials did not violate the students' first and fourteenth amendment rights. Id. at 15. This appeal followed.

Application of the Equal Access Act

The EAA provides in relevant part:

> **(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited**
>
> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> **(b) "Limited open forum" defined**
>
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

20 U.S.C. § 4071(a)-(b).

The EAA is only applicable to those federally assisted public secondary schools which maintain a "limited open

forum" as defined by the Act. A public secondary school may properly exclude a student club on the basis of the content of the club's speech only if the school maintains a closed forum--that is, if all of the other student clubs are curriculum related. If even one noncurriculum-related student club is allowed, the school maintains a limited open forum as defined by the EAA and cannot deny the club access to school premises during noninstructional time on the basis of the content of the club's speech.

"Noncurriculum related" is not defined in the Act. Appellants argue, however, that WHS has created a limited open forum because several of the student clubs are noncurriculum-related. Some ten clubs were cited by appellants as being noncurriculum-related. Among these are the Chess Club; Interact, a service

club peripherally connected to Rotary International; Subsurfers, a club for students and community members interested in scuba diving; and Zonta, the female counterpart to Interact.

At trial, WHS attempted to show that each of these clubs is curriculum-related. For example, Dr. Findley testified that the Chess Club related to the curriculum because it fosters critical thinking and logic. Dr. Findley explained that such skills are extensions of the goals for several different courses, even though WHS does not offer a logic class. Dr. Findley explained that Zonta and Interact are related to the goals of sociology and psychology and that Subsurfers relates to the goals of physical education. The district court found these arguments persuasive and held

that WHS maintains a closed forum and that, therefore, the EAA does not apply to WHS. We disagree.

Allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum

and then discriminate against a particular student group on the basis of the content of the speech of that group.

The legislative history of the EAA is helpful in determining what Congress intended to be considered noncurriculum-related. During a Senate debate before the passage of the bill, Senator Gorton and Senator Hatfield discussed the definition of "noncurriculum-related" student groups:

> MR. GORTON: I gather from the previous remarks of the Senator from Oregon and the Senator from Alabama that the definition of these non-related student groups is fairly broad. The chess club would be such a group. If the school permits a chess club, it has thereby created the limited open forum which brings into effect the proscriptions of the act.

MR. HATFIELD: That is correct. 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statements of Sens. Gorton and Hatfield). Congress did not intend for the EAA to be easily circumvented by administrative decree. Many of the student clubs at WHS, including the chess club, are noncurriculum-related. Therefore, WHS maintains a limited open forum, and the EAA forbids discrimination against appellants' proposed club on the basis of its religious content.

Constitutionality of the Equal Access Act

Appellees argue that even if WHS has created a limited open forum, this court should still affirm the decision of the

district court because the EAA violates the establishment clause. We disagree.

The EAA codifies the Supreme Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), (Widmar), extending that holding to secondary public schools.[1] The facts in Widmar are quite similar to the facts in the instant case. The University of Missouri at Kansas City, a state university, generally allowed registered student groups to use its facilities. However, the university did

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[1] As Senator Levin explained during the Senatorial debate before passage of the EAA:

> [T]he pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools.

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin).

not allow registered student groups desiring to use the facilities for religious worship and religious discussion.

To determine whether an "equal access" policy at the university allowing registered student religious groups to meet would offend the establishment clause, the Court applied the three-part test from Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (Lemon). Under the Lemon test, a policy or statute is constitutionally sound if: (1) it has a "secular . . . purpose," (2) "its . . . primary . . . effect . . . neither advances nor inhibits religion," and (3) it does not "foster 'an excessive government entanglement with religion.'" Id. (citation omitted).

Widmar concluded that an equal access policy at the university level did not violate any part of the Lemon test. First, the policy has a secular purpose because one of the university's purposes is to provide a forum for the exchange of ideas between students. 454 U.S. at 271 n.10.

Second, the policy did not have the "primary effect of advancing religion" because any benefits conferred on religious groups would be "merely 'incidental.'" Id. at 273. Two factors influenced the Court in its determination that an equal access policy at the university level did not have the primary effect of advancement of religion. First, the policy did not "confer any imprimatur of state approval on religious sects or practices," id. at 274, because young adults are able to understand that

such a policy is neutral toward religion. Id. at 374 n.14. Second, the fact that the benefits would be devolved upon such a wide variety of nonreligious as well as religious groups would indicate a "secular effect." Id. at 274.

Finally, an equal access policy was less likely to entangle the university with religion than a policy of religious censorship which would require the university not only to define "religious speech" but also to constantly monitor the meetings of registered student groups. Id. at 272 n.11.

The Court also held that the university's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral." Id. at 277.

The language of the EAA closely tracks the holding of the Court in Widmar. In fact, the only difference between the EAA and Widmar is the EAA's express extension of the equal access principle to public secondary school students. Any constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students.[2] We reject this notion because Congress

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[2]The argument that less mature high school students are likely to confuse an equal access policy with state sponsorship of religion was explicitly rejected by the Senatorial Committee on the Judiciary in its report of the EAA:

> Authors writing in leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism.

S. Rep. [illegible] 357, 98th Cong., 2d. Sess. 8 (1984).

considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' fact-finding.

Indeed the facts in the case before us today are the same as the facts in Widmar except for the setting. Therefore, even if Congress had never passed the EAA, our decision would be the same under Widmar alone.[3]

Accordingly, we reverse the decision of the district court.

A true copy.

Attest:

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[3] But see Garnett v. Renton School District No. 603, No. 88-3552 at 375, 384 (9th Cir. Jan 17, 1989).

> The impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals--distinguish public secondary schools from public universities.

CLERK, U.S.

COURT OF

APPEALS, EIGHTH CIRCUIT.

APPENDIX B

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, et al.,	)	CV 85-O-426
Plaintiffs,	)	
UNITED STATES OF AMERICA,	)	
Intervenor Plaintiff,	)	
vs.	)	MEMORANDUM
THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,	)	
Defendants.	)	

APPEARANCES:

For plaintiffs -- Douglas Veith
Omaha, Nebraska

Douglas W. Davis
Robert K. Skolrood
Virginia Beach,
Virginia

For plaintiff-intervenor -- Douglas Semisch
Omaha, Nebraska

Theodore C. Hirt
Thomas Bevard
Washington, D.C.

For defendant -- Allen E. Daubman
Verne Moore, Jr.
Omaha, Nebraska

BEAM, District Judge.

This matter comes on for decision after a trial to the Court. The basic issue presented is whether the formation of a Christian religious club at Westside High School (WHS) in Omaha, Nebraska is constitutionally permissible.

Plaintiffs contend that the Equal Access Act (EAA), 20 U.S.C. §§ 4071-74 and the first amendment to the Constitution of the United States allow them to form and operate the proposed group. Specifically, the plaintiffs claim that their free speech and free religious exercise rights guaranteed by the first amendment are being violated by WHS and that their fourteenth amendment right to equal protection is being ignored. The defendants, on the other

hand, argue that such an activity, if permitted, would violate the establishment clause of the first amendment, notwithstanding the mandates of the EAA or the plaintiffs' other constitutional rights.

The Court finds that plaintiffs have standing to raise these issues, that all constitutional rights alleged are available to plaintiffs but that such rights have not been violated by WHS under the circumstances presented in this action.

Facts

Plaintiffs are former and current students of WHS who attempted to form and operate a Christian Club at the school. The proposed club would have been identical in its formation, rights, privileges, and obligations to all other WHS clubs with but one exception, no

faculty sponsor was proposed unless required. See Pretrial Stipulation 13. The Principal of WHS, Dr. James E. Findley, and Dr. James A. Tangdall, Superintendent for the Westside Community Schools, ultimately denied the plaintiffs' request. The Board of Education voted to uphold the denial.

Constitutional Background

The first amendment states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

The history and background of this passage in the First Amendment has been discussed on numerous occasions and the debate will not be reiterated here in detail. See Engel v. Vitale, 370 U.S. 421, 425-30 (1962); McGowan v. Maryland, 366 U.S. 420, 437-42 (1961); Everson v. Board of Educ., 330 U.S. 1, 8-14 (1947).

It suffices to say that our founding fathers were adamant about protecting religious activities from government interference, whether promotional or prohibitory in nature.

The barrier between religion and government has been likened to a "wall between church and state." Everson, 330 U.S. at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). However, the tension between the free speech, establishment and free exercise clauses of the first amendment make the Everson proclamation more a motto than an immutable principle. As the role and mission of government has changed, the striking of a proper balance of interests has become increasingly difficult.

Religious instruction has traditionally been the responsibility of church and home. Even when these

interests have become intertwined, in part, with secular educational activities, they have been constitutionally protected. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state act could not require primary school students to abandon church operated school in favor of a public educational institution).

The right of free speech is protected in our public high schools. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) (students' right of free speech upheld). And, the right is no less protected when it is religious in nature. Bender v. Williamsport Area School Dist., 741 F.2d 538, 545 (3d Cir. 1984), vacated for lack of standing, 475 U.S. 534 (1986) (citing Heffron v. International Soc'y for Krisha Consciousness, 452 U.S. 640, 647 (1981)).

In fact, the thrust of the free exercise and free speech clauses, when considered together, leads to the conclusion that heightened consideration should be accorded religious speech, wherever it is practiced.

Mr. Justice Douglas, in delivering the opinion for seven members of the Supreme Court in Murdock v. Pennsylvania, 319 U.S. 105 (1943), said, "[f]reedom of press, freedom of speech, [and] freedom of religion are in a preferred position." Id. at 115 (emphasis added). However, as our society has become more pluralistic, Justice Douglas' pronouncement in Murdock has been muffled. Bright lines circumscribing constitutional interests, if any ever really existed, have blurred. There appears to have been an enhancement in the force of the establishment clause at the expense of the free speech and

free exercise clauses. The result has been, according to many, a diminution of the influence of religious mores upon educational and other governmental activities, contrary to the intent, it is argued, of the framers of the Constitution. Thus, for the Court, these issues present at the very least, "a constitutional conflict of the highest order." Bender, 741 F.2d at 557.

The analysis necessary to properly apply the competing interests in this dispute is guided by the holding of the Supreme Court in Widmar v. Vincent, 454 U.S. 263 (1981). In Widmar, the University of Missouri at Kansas City (UMKC) prohibited a religious group from using university facilities "for purposes of religious worship or religious teaching." The UMKC action was

challenged, as here, by students asserting free exercise and free speech rights.

The University argued that to offer its facilities for a religious purpose would violate the establishment clause. It pointed to the three pronged test established by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971). In Lemon, the Court said that in order to pass constitutional muster the government policy in question (1) must have a secular legislative purpose; (2) must have a primary effect of neither advancing nor inhibiting religion; and (3) must not foster an excessive government entanglement with religion. Widmar, 454 U.S. at 271 (citing Lemon, 403 U.S. at 612-13).

It is clear from Widmar that religious speech is afforded the same protection as the political speech shielded, in an educational setting, in Tinker. It is equally clear, however, that in such a setting, reasonable regulations compatible with the mission of the institution may be applied. Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562, ____, 56 U.S.L.W. 4079, 4082 (1988).

At UMKC, over 100 student groups had been recognized by the administration. The various clubs embraced a wide variety of political, cultural, educational, athletic and other interests. Under the circumstances, the Court found that at least a limited open forum existed for the exchange of ideas and information by students. Thus, the Court determined that two of the three prongs of Lemon had

been met. "[A]n open forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement of religion." Widmar, 454 U.S. at 271-72.

The University argued that a forum within which religious speech was permitted would have the "primary effect" of advancing religion. Id. at 272. The Court found, however, that in such a context the open forum would not result in an unconstitutional advancement of religion.[1] Indeed, the Court, citing

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[1]In this regard, WHS argues that high school students, as compared with college students at UMKC, are more impressionable and more susceptible to believing that the school approves and promotes the religious activity. Under the facts of this case, the Court rejects this contention. First, the proposed format protects against the conferring of an imprimatur of school approval. Second, Dr. David Workman, an expert in the development of cognitive reasoning and intellectual development, testified that students over the age of 12 years can make sponsorship distinctions and that

Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 771 (1973), restated that a religious organization may receive "incidental" benefits from government without the creation of a constitutional violation. Widmar, 454 U.S. at 273-74.

The Westside Story

Widmar, thus, provides the initial framework for deciding this case.[2] At this point, however, the Court must also begin its consideration of the Equal Access Act since the Act is, at least in part, a congressional effort to make

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there is no significant differences between high school and college students in their abilities to understand endorsement or nonendorsement by the school. The Court credits this evidence.

[2]As in Widmar, this is not a case in which plaintiffs claim that denial of facilities not available to other groups leads to a first amendment violation. Id. at 273 n.13.

Widmar applicable to public secondary schools.[3] The Act provides, in part, as follows:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> * * *
>
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

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[3]The Committee Report discusses Widmar at length, and the language of the statute tracks, at least generally, the holdings of Widmar, directing their application to public secondary schools. See generally, S. Rep. No. 357, 98th Cong., 2d Sess. 5-7, 21-27, reprinted in 1984 U.S. Code Cong. & Admin. News, 2348, 2351-53, 2367-73.

20 U.S.C. §§ 4071(a)-(b).

The Act's applicability turns on whether or not the public secondary school has created a limited open forum, as was found by the Supreme Court to exist in Widmar. If a school has created a limited open forum, the Act applies and mandates that the school offer a "fair opportunity" to students who wish to conduct a meeting for religious or other purposes. 20 U.S.C. § 4071(c). If a closed forum exists, however, the act does not require a school to indiscriminately permit student groups to meet on school premises. The first question which must be addressed by the Court, then, is the nature of the forum at WHS.

The Supreme Court has recognized three types of speech forums: open or public, limited open, and closed. The Court has defined open and limited open forums as follows:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.' In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant

> government interest, and leave open ample alternative channels of communication.
>
> A second category consists of public property which the State has opened for use by the public as a place for expressive activity. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983) (citations omitted). In the secondary school setting, the Supreme Court has recently stated that "school facilities may be deemed to be public forums only if school authorities have

'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." Hazelwood, 108 S. Ct. at ____, 56 U.S.L.W. at 4081. If the school reserves the use of its facilities for other intended purposes, no public forum is created. Id. Under the EAA, the question is somewhat more focused, turning on whether the school permits "noncurriculum related student groups" to meet on school premises. 20 U.S.C. § 4071(b).

In Widmar, the Court found that an open forum existed because the University had made its facilities "generally available" for use by student groups, and had enacted a policy of "accommodating" and "encouraging" student group meetings. Widmar, 454 U.S. at 267. As indicated,

the University had recognized numerous student organizations, representing a "broad spectrum" of topics and interests. Because the University had created an open forum, it was required to demonstrate a compelling interest supporting its decision to exclude a religiously oriented group from use of its facilities. Id. at 269-70. The Court recognized that its holding was narrow, and limited to instances where a forum "generally open to student groups" had been created. Id. at 277.[4]

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[4]A limited open forum was also found to exist in Bender. There, the school had a scheduled "activity period" during regular school hours, where students could attend a meeting of the club of their choice. All types of clubs were permitted by the school, the only limitation being that the club "contribute to the intellectual, physical or social development of the student" and be "legal[ly] and constitutionally proper." Bender, 741 F.2d at 544. Such facts, like the situation present in Widmar, differ markedly from the policy in force at WHS.

The defendants argue that this case presents facts at variance with Widmar, in that WHS maintains a closed forum. They cite School Board Policy 5610, which states:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.
>
> Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

> Students participating in out of school clubs or organizations may not identify the clubs as school-affiliated organizations without prior administrative approval.

Defendants argue that this policy demonstrates the following: (1) student clubs and organizations are an integral part of the WHS program; (2) clubs must be under the direct control of the school administration; (3) there must be a faculty sponsor; and (4) all WHS clubs are curriculum related.

In determining the kind of forum which exists at WHS, the Court must look at the overall makeup of the school curriculum and club system. Pretrial Order Stipulation #17 states:

> Plaintiffs and Defendants have agreed that the following ten clubs are ones which Plaintiffs claim are noncurriculum [related] for purposes of the Equal Access Act and Plaintiffs' constitutional claim of right of access to school premises for the

Christian Club. By doing so Plaintiffs are not admitting that the remaining clubs are curriculum related as envisioned by the Equal Access Act:

Interact	Welcome to Westside
Chess	Future Business
Subsurfers	Leaders of America
National	Zonta
Honor	Student Advisory
Society	Board
Photography	Student Forum

Dr. Findley and Dr. Tangdall discussed each of these student organizations. They explained that Interact, a service club which is peripherally connected to Rotary International, is related to sociology and psychology, and that participation can result in a better grade for a student; chess club provides an arena for logical thinking, and is, therefore, an extension of a WHS logic class; Subsurfers, it is urged, is related to the goals of the physical education department; the National Honor

Society is related to all courses and is an honor and not, technically, a club; photography club is really a class which is related to the art department; Welcome to Westside likewise is not a club but a matching of new students with older students in an effort to provide a better educational ambience; Future Business Leaders of America fosters the development of business skills and is related to WHS business and economic courses; Zonta is the female counterpart to Interact; and, Student Advisory Board and Student Forum are generally related to democracy, citizenship, and indirectly, to the classes on government.

All of these clubs apparently have sponsors. The involvement of sponsors varies from club to club based on the needs of the club and the desire of the sponsor. Likewise, sponsors receive

remuneration for their services, although no clear guidelines were presented for determining the amount of pay received.

Dr. Findley testified that, in his opinion, all clubs and activities at WHS are curriculum related. Dr. Findley further stated that the WHS administration strongly encourages participation in the club system. He said that the curriculum at WHS includes requires courses, elective courses, and clubs. Clubs and activities, it is urged by Dr. Findley, are important to the overall goals and mission of the school because children who partake of activities seem to be more successful in later life.

Aside from the club system, the general atmosphere at WHS appears to encourage frank discussion of controversial issues. During

instructional times, such topics as drugs, separation of church and state, Vietnam protests, use of arm bands, atheism, abortion, homosexuality, birth control, premarital sex, nuclear war, and Contra aid are discussed. Controversial subjects appear in the school newspaper. Recently a poster for an evangelist speaker was posted, although Dr. Findley indicated that he removed it. The administration argues that in all of these discussions a balanced point of view is sought to be presented. Testimony at trial demonstrated that WHS administrators are extremely concerned with exposing students to all sides of controversial issues. Dr. Findley testified that permitting a sanctioned Christian group would stand in conflict with this policy. In fact, he said that he would consider doing away with all

clubs at WHS, if necessary, to ensure that a closed forum, consistent with administrative policy, could be maintained.

Upon consideration of all these facts, the Court concludes that WHS has not created a limited open forum as that term is used in the EAA or in the Supreme Court's analysis in Widmar and Hazelwood. Clearly the facts do not establish that WHS has a policy or practice of "indiscriminate use" of its facilities by student organizations or the general public. In fact, WHS has only sparingly permitted, outside of the classroom setting, the use of school facilities for political, social or economic discussions. The Court is convinced that those clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the

educational function of the institution. The club system plan at WHS differs dramatically from those found to create an open forum policy in Widmar and Bender. These differences justify an alternate conclusion in this case. The Court, therefore, finds that WHS has not created an open or limited open forum which now requires access to its facilities by the plaintiffs' club.[5]

The only remaining issue which must be addressed in light of the Court's determination that WHS maintains a closed forum is whether the school's refusal to permit the plaintiffs' club to meet within this closed forum unduly infringes upon the plaintiffs' first amendment rights to freedom of speech and free

---

[5]Given this conclusion, WHS is not bound by the dictates of the EAA. The Act's constitutionality need not, therefore, be addressed by the Court in this case.

religious exercise. The Court is guided in this regard by the standards set forth by the Supreme Court in Hazelwood. The Supreme Court recognized in Hazelwood that when a public forum has not been created by a school, school officials may impose restrictions on the speech of students, teachers, and other members of the school community which are "reasonably related to legitimate pedagogical concerns." Hazelwood, 108 S. Ct. at ____, 56 U.S.L.W. at 4082. The Court said, "It is only when the decision to censor a . . . vehicle of student expression has no valid educational purpose that the First Amendment is so 'directly and sharply implicate[d]' as to require judicial intervention to protect students' constitutional rights." Id. at ____, 56 U.S.L.W. at 4082-83 (citations omitted).

The purpose articulated by WHS administrators for refusing to permit the plaintiffs' club to meet involves the school's goal of presenting a balanced view when political, religious and economic information is dispensed within WHS facilities. The Court finds this to be a legitimate educational concern which reasonably justifies WHS's actions in this case. Under the test set forth in Hazelwood, the decision of WHS to deny the plaintiffs access to its facilities for officially sanctioned meeting purposes does not offend the constitution.

In so holding, the Court notes that plaintiffs are free to exercise their religious beliefs and engage in informal religious discussions at school. Bridget Mergens testified that she was never prohibited from engaging in such

activities at WHS. In fact, Dr. Findley stated that he would have agreed to and even encouraged nonsanctioned, informal meetings by Mergens' group. Any attempt by WHS to prohibit such informal meetings or exchanges between students, before or after instructional time, and even using school rooms or cafeteria tables, subject, of course, to reasonable time, place and manner restrictions would meet strong constitutional objection. See, e.g., Tinker, 393 U.S. at 513. In this case, the Court holds simply that WHS need not permit its facilities to be used by a school sanctioned Christian club.

Conclusion

On the facts adduced, the plaintiffs have not sustained their burden of proof on the issue of the nature of the forum presented. Accordingly, this action

should be dismissed. A separate order consistent with this Memorandum will be entered.

DATED this 2nd day of February, 1988.

BY THE COURT:

C. ARLEN BEAM
U.S. District Court
Judge
Sitting by Special
Designation

APPENDIX C

APPENDIX C

Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§4071-4074.

§4071 Denial of Equal Access Prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that -

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meet-

ings only in a non-participatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Federal or State authority nonexistent with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof -

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Unaffected Federal financial assistance to schools

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order-and-discipline, well-being, and voluntary-presence concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§4072. Definitions

As used in this subchapter -

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly

related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

§4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with with the provisions of this subchapter.

No. 88-1597 (2)

Supreme Court, U.S.
FILED
MAY 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda Simmons,

Respondents,

United States Of America,

Respondent,

Kendra K. Kellison, etc, by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents,

Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Waggoner and Allison Wells.

Respondents,

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. May a public high school which makes its facilities available after school hours for the activities of student clubs, close its forum to a student group desiring to use the facilities on an equal basis with other student clubs for religious worship and discussion?

2. Does the Equal Access Act, 20 U.S.C. §§4071-4074 (1988), which codifies this Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), with respect to public secondary schools which receive federal funds, unconstitutionally establish a religion by requiring that a voluntary, student-initiated Bible Club which meets during non-instructional time be treated on an equal basis with other student clubs?

LIST OF PARTIES

All parties to the proceeding are listed in the caption. Respondents Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Waggoner and Alison Wells were added as additional appellants by Order of the United States Court of Appeals for the Eighth Circuit on March 28, 1989.

TABLE OF CONTENTS

	Questions Presented	i
	List of Parties	i
	Table of Contents	ii
	Table of Authorities	iii
	Opinions Below.	v
	Constitutional and Statutory Provisions.	v
I.	Counterstatement of the Case. .	1
II.	Argument.	11
	A. The Petition for a Writ of Certiorari should be denied because the Eighth Circuit Court of Appeals correctly decided this case in conformity with the Constitution of the United States and this Court's precedents	11
	B. Petitioners have made material misstatements of fact in their Statement of the Case providing sufficient grounds pursuant to Rule 21.5 of this Court for denial of the Writ of Certiorari	16
III.	Conclusion	20

TABLE OF AUTHORITIES

CASES	Page
Bender v. Williamsport Area School District, 475 U.S. 534, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986)	11,19
Bethel School District v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L.Ed.2d 549 (1986)	13
Garnett v. Renton School District, 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending	21
Hazelwood School District v. Kuhlmeier, 484 U.S. ____, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)	14,15
Mergens v. The Board of Education of the Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989)	passim
Mergens v. The Board of Education of the Westside Community Schools, No. CV 85-0-426, Slip Op. (D. Neb. Feb. 2, 1988)	8,9, 11,13
Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)	15
Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)	15
Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)	passim

STATUTES & OTHER AUTHORITIES

Equal Access Act, 20 U.S.C. §§4071-4074 (1988) . . . . . passim

United States Supreme Court Rule 21.5 16

Mergens Trial Transcript 611:4; 611:16; Findley. 5

Mergens Trial Transcript 636:10-14; Tangdall. 17

Mergens Trial Transcript 531:5; Huston. 17,18

Affidavit of James Findley in Opposition to Request for Preliminary Inj., p. 2, No. 17, May 10, 1985 18

Affidavit of James Tangdall in Opposition to Request for Preliminary Inj. p. 2, No. 16, May 10, 1985 18

OPINIONS BELOW

The Opinion of the Court of Appeals for the Eighth Circuit is reported as Mergens v. The Board of Education of the Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989). The Memorandum Decision of the United States District Court of Nebraska is not reported, but is reprinted at Appendix B of the Petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The pertinent provisions of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1988), are set forth in the Petition, page 3 and Appendix C.

I.

COUNTERSTATEMENT OF THE CASE

This case presents the question whether a public high school which makes its facilities available for the activities of approximately 30 voluntary student initiated groups, may selectively close its forum to a group of students desiring to use the facilities for religious worship and religious discussion. This case is Widmar v. Vincent, 454 U.S. 263 (1981) at the public secondary school level.

Westside High School (WHS) is a part of the Westside Community School system, an independent public school district which is managed, governed and controlled by the petitioners, the Board of Education of the Westside Community Schools. WHS is a public secondary school which receives federal funds as contemplated by the Equal Access Act 20 U.S.C. §4071-74 (1988).

Students who attend WHS are allowed to form, organize, and participate in various student groups and clubs which meet after required school hours on school grounds. Students may choose from approximately 30 different groups and clubs, all having faculty sponsors. Students are encouraged to initiate requests for the formation of WHS clubs. Attendance at club meetings is strictly voluntary and depends solely on student interest.

School Board Policy 5610 declares that student clubs are a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." The policy does not impliedly or expressly classify these clubs as being related to the WHS curriculum.

There is no written policy or formal guideline for the formation of clubs. A student wishing to form a club would

normally be directed to the Assistant Principal and Activities Director, Ronald Huston, who would then analyze the proposed group's goals and objectives and decide whether or not the club complied with School Board Policy 5610.

Although the clubs are assigned faculty sponsors, participation varies and is primarily custodial in nature. The sponsors serve on a voluntary basis and may accept or decline remuneration for their services. No other student group had ever before been excluded from WHS on the basis of the content of speech.

For some students at WHS, Christian fellowship, Bible reading and prayer are a vital part of their lives. These students seek to form a Bible Club strictly for the purpose of engaging in religious worship and discussion with other interested students, just as other students are permitted through the various clubs at WHS. The students in this case have diverse religious backgrounds, and the

proposed Bible Club is to be open to any WHS student wishing to participate.

In January of 1985, respondents Bridget Mergens and Andrea Simmonds agreed they would like to start a Bible Club at WHS. Ms. Mergens presented this request to Dr. Findley, the principal of WHS. Ms. Mergens requested that the club be treated in the same manner as other WHS clubs but indicated that a teacher sponsor would not be required if the school could not or would not provide one. Instead of referring her to the Activities Director, as is customary, Dr. Findley immediately denied Ms. Mergens' request for a Bible Club based on the religious content of the club's speech.

Despite petitioner's allegations to the contrary, Dr. Findley testified at trial that he would also prohibit Ms. Mergens from informally meeting with other students at WHS to discuss religion on a

regular basis without official school approval:

> Q. The question is if you had known they were in the classroom discussing religious subjects on a voluntary basis, would you have asked them to stop doing that?
>
> A. If I perceived that as a formal thing that they were going to continuously do and emphasize within the building and if I perceived that was what was happening, I would probably not let them meet.
>
> (Tr. 611:4; 611:16; Findley).

In February 1985, Ms. Mergens presented her request to Dr. Findley and Dr. Tangdall, Associate Superintendent of Schools for the Westside Community Schools. At that time, the request was discussed with Kenneth Hansen, Superintendent of Schools for the Westside Community Schools. All three school officials agreed that the request be denied on the grounds that allowing such a club would violate the "separation of church and state."

On March 4, 1985, Ms. Mergens petitioned the Board of Education to allow

the Bible Club to meet. Ms. Mergens stressed that a faculty sponsor was not needed unless required by school policy. If one were required, Ms. Mergens said that the Bible Club would need a sponsor only for custodial purposes. Despite the fact that Ms. Mergens was willing to comply fully with School Board requirements, the School Board denied her request based on the contention that the proposed club would not be consistent with Board Policy which permits school buildings to be used only for school-sponsored activities.

On April 15, 1985, the respondents brought suit in the District Court for the District of Nebraska, alleging that the school's actions violated the Constitution of the United States, the Nebraska Constitution and the Equal Access Act. The case was tried to the Court in April 1987.

During trial, two experts testified for the respondents, Dr. Ward Sybouts, a

curriculum expert and Dr. David Moshman, an expert in child development.

Dr. Sybouts testified that he had studied the Equal Access Act, Equal Access guidelines, congressional testimony, and the WHS forum. He went on to say that in his opinion Congress had adopted a definition of curriculum which would include only those activities related to courses for which credit is given. Dr. Sybouts' opinion was that WHS offered noncurriculum related student clubs, including Interact, Chess Club, Welcome to Westside and Student Forum.

Dr. Moshman, an expert in the development of cognitive reasoning and intellectual development of children, testified that by age 12, students understand the difference between school sponsored or endorsed religious activities and voluntary student initiated and directed religious activity. His studies confirmed that there is no significant difference between the ability of a high

school student and a college student to make such a distinction.

The evidence at trial also established that the proposed Bible Club would be consistent with the missions and goals enumerated in School Board Policy 5610. The WHS administrators all admitted that the Bible Club could promote the stated goals and missions of the high school, including critical thinking, citizenship, wholesome attitudes, good human relations, knowledge and social skills.

On February 2, 1988, the District Court decided the case by holding that WHS maintains a closed forum and therefore the Equal Access Act does not apply. The court also held that the students' First and Fourteenth Amendment rights were not violated by the actions of school officials. The court found however, that the students at WHS could in fact distinguish between school endorsed religious activity and student initiated religious activities. Mergens v. The

Board of Education of the Westside Community Schools, No. CV 85-0-426, Slip Op. at 11, n.1 (1988). The court's finding effectively dismissed the contention that the Establishment Clause requires exclusion of a Bible Club from the WHS forum.

The Eighth Circuit Court of Appeals on February 8, 1989, reversed by holding that WHS maintains a limited open forum under the Equal Access Act, that the Equal Access Act is constitutional, and that this Court's decision in Widmar requires reversal. The court realized that the broad interpretation of "curriculum-related" adopted by WHS officials would permit school officials to circumvent the Equal Access Act by administrative decree while allowing them to arbitrarily deny unfavored student speech. Mergens v. The Board of Education of the Westside Community Schools, 867 F.2d 1076, 1079 (8th Cir. 1989). Relying upon legislative history, the Court found that by allowing

a Chess Club to meet, as well as other noncurriculum related clubs, WHS had created a limited open forum for student speech. Mergens, 867 F.2d at 1079.

The Eighth Circuit also held that the Equal Access Act closely tracks this Court's decision in Widmar and the only difference between this case and Widmar was the extension of Widmar principles to the high school level. In light of Congressional fact finding rejecting the notion that high school students would confuse an equal access policy with state sponsorship of religion, the court found that the Equal Access Act does not violate the Establishment Clause. Mergens, 867 F.2d at 1079-1080.

The Eighth Circuit concluded by stating that Widmar compels the same result even in the absence of the Equal Access Act. Mergens, 867 F.2d at 1080.

The court's holding with regard to impressionability is supported by the uncontroverted expert testimony of Dr.

Moshman and the District Court's finding of fact. Mergens, Slip Op. at 11 n.1. In addition, Justice Powell's controversial footnote in Widmar, 454 U.S. at 274, n.14 has been subsequently clarified in Bender v. Williamsport Area School District, 475 U.S. 534, 556 (1986), where Justice Powell noted that the difference in age between high school and college students does not justify a departure from Widmar.

II.

ARGUMENT

A. The Petition for a Writ of Certiorari should be denied because the Eighth Circuit Court of Appeals correctly decided this case in conformity with the Constitution of the United States and this Court's precedents.

The Opinion of Circuit Judge Theodore McMillian, joined by Chief Judge Donald Lay and Senior Circuit Judge Floyd R. Gibson is correct and represents a long overdue vindication of the free speech and religious liberty rights of high school

students. The decision comports with the precedents of this Court regarding student free speech rights, therefore, certiorari is inappropriate.

As noted by Judge McMillian, this case is virtually identical to Widmar except for the high school, rather than college, setting. Mergens, 867 F.2d at 1080. By utilizing the language of the Equal Access Act, which codified the principles of Widmar and extends that holding to secondary public schools, Mergens, 867 F.2d at 1079, the court recognized that WHS, like the University of Missouri at Kansas City, has created a limited open forum for student speech.

WHS actively maintains non-compulsory, non-credit student groups such as the Chess Club, Interact, a service club connected to Rotary International, and Subsurfers, a scuba diving club open to students and members of the general public. Mergens, 867 F.2d at 1078. Like UMKC, WHS refused to allow access to a

student group desiring to use the facilities for religious worship and religious discussion.

Consistent with this Court's decision in Widmar, an equal access policy "does not confer any imprimatur of State approval on religious sects or practices." Widmar, 454 U.S. at 274. The argument that impressionability of high school aged students changes this result was specifically rejected by the District and Circuit Courts. Mergens, Slip Op., at. 11, n.1; Mergens, 867 F.2d at 1080.

The present case is not only indistinguishable from Widmar, but consistent with each of this Court's rulings regarding student speech rights. In Bethel School District v. Fraser, 478 U.S. 675 (1986) the Court stated that a school need not tolerate student speech inconsistent with its "basic educational mission," or "wholly inconsistent with the 'fundamental values' of public school education." Bethel, 478 U.S. at 685-86.

There is no evidence in Mergens that a Bible Club would be inconsistent with the school's mission. To the contrary, administrators testified that a Bible Club would provide a 'means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills" as mandated by school board policy.

In Hazelwood School District v. Kuhlmeier, 484 U.S.____, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), this Court dealt with the issue of school control over class related speech. The newspaper in that case was the product of the Journalism II class. It was part of the "regular classroom activity," a faculty member actively taught and exercised control over the paper, and students received grades and academic credit for their performance in the course, thus making the paper, by policy and practice, a closed forum subject to any reasonable regulation. Hazelwood, 98 L.Ed.2d at 603.

In Hazelwood, this Court reaffirmed

the principle that school facilities "may be deemed to be public forums" where school authorities "have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public' [citing Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37, 47 (1983)] or by some segment of the public, such as student organizations." [Citing Widmar]; Hazelwood, 98 L.Ed.2d at 603 (emphasis added). As noted by the Eighth Circuit, no club at WHS has ever been denied access to the school on the basis of speech content until the Bible Club was denied the right to form and meet. Mergens, 867 F.2d at 1077.

The facts in Mergens place it squarely within this Court's holdings in Widmar and Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). The speech is student-initiated and voluntary. The Bible Club would not disrupt school activities and furthers the educational mission of the school.

Permitting a Bible Club to meet under an "equal access" policy does not constitute an establishment of religion. High school students are capable of distingushing between equal treatment of student speech and state mandated or state endorsed religious speech.

The decision of the Eighth Circuit Court of Appeals is constitutionally correct and in accord with this Court's precedents. Certiorari is unnecessary in this case.

B. Petitioners have made material misstatements of fact in their Statement of the Case providing sufficient grounds pursuant to Rule 21.5 of this Court for denial of the Writ of Certiorari.

In the Petition's Statement of the Case, petitioners seriously misstate the facts of this case. Comparison of the statement of petitioners with the record and respondent's counterstatement highlight the material misrepresentations made in the Petition.

For the sake of brevity, two specific examples are cited for the Court. First, petitioners state at page 6 of the Petition that the school had no objection to informal meetings of the Bible Club, but only objected to school-sanctioned meetings. The record shows that the school would have stopped students from informally meeting for religious discussion if such meetings were conducted on a regular basis. Associate Superintendent Dr. Tangdall testified as follows:

> Q. If they were using one of the classrooms to discuss religious matters and they had not asked your permission to meet?
>
> A. If they were on a regular basis, I would tell them that they couldn't do that.
>
> (Tr. 636:10-14; Tangdall).

When asked the same question, Activities Director Dr. Huston stated "I don't think it's [sic] probably appropriate for us as public school, non-sectarian, to permit that. (Tr. 531:5;

Huston).

Religious speech, formal or informal was disfavored speech at WHS, so much so that petitioners stated that they would eliminate all other student organizations at WHS in order to close the forum and keep the Bible Club out:

> That in the event any one or more of the student clubs or organizations are determined to be non-curriculum related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, I would recommend to the administration and Board of Education that it consider amending the policies to discontinue such student clubs or organizations.

Affidavit of James Findley in Opposition to Request For Preliminary Inj., p. 2, No. 17, May 10, 1985, Def. Ex. 101; Affidavit of James Tangdall in Opposition to Request For Preliminary Inj., p. 2, No. 16, May 10, 1985, Def. Ex. 102.

Second, petitioners imply on pages 12 to 13 and 17 to 18 of the Petition that the issue of impressionability

remains open in this case. Based on the uncontroverted testimony of Dr. David Moshman and the format of the clubs at the school, the District Court found that high school students are not more impressionable than college age students and that they are capable of making religious sponsorship distinctions. Mergens, Slip Op. at 11, note 1. The Eighth Circuit concurred in this finding of fact, taking note that Congress in passing the Equal Access Act, made the same finding. Mergens, 867 F.2d at 1080 and n.2. Justice Powell, who raised, but did not answer the issue in Widmar, 454 U.S. at 274, n.14, stated in his dissent in Bender v. Williamsport Area School District, 475 U.S. 534, 555 (1986) that he did not believe "in this age of massive media information--that the few years difference in age between high school and college students justifies

departing from Widmar." (Powell, J. dissenting on other grounds).

This Court is not the place to relitigate the facts of this case. Because petitioners have misstated material facts, the Petition for Writ of Certiorari should be denied.

III.

CONCLUSION

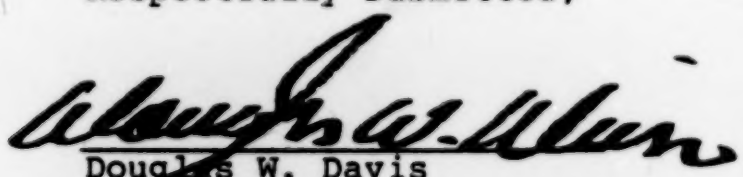
The denial of a writ of certiorari is appropriate. Judge McMillian, Chief Judge Lay and Senior Judge Gibson correctly applied the law in this case. Petitioners have made patently false statements concerning the facts of the case in an effort to have it reviewed.

Respondents recognize that this Court may be disposed to grant the writ due to the fact that the Ninth Circuit Court of Appeals, faced with the same constitutional claim as has

been made here, reached the opposite conclusion. Garnett v. Renton School District No. 603, 865 F.2d 1121 (9th Cir. 1989), petition for rehearing en banc pending.

Should the Supreme Court of the United States be disposed to grant the writ, it will have the opportunity to clearly affirm as the law of the land, the liberty of all high school students to be free from selective discrimination based on the religious content of their speech. The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,



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No. 88-1597

In the Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioners had allowed one or more "noncurriculum related" student groups to meet on school premises during noninstructional time, thereby triggering the application of the Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V 1987).

2. Whether the Equal Access Act, which makes it unlawful for any public secondary school subject to the Act to deny equal access to students who wish to form an organization at the school to engage in religious speech, violates the Establishment Clause.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 6
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Bell v. *Little Axe Ind. School Dist.*, 766 F.2d 1391 (10th Cir. 1985) 10
Bender v. *Williamsport Area School Dist.*:
469 U.S. 1206 (1985) 7
475 U.S. 534 (1986) 7, 8
741 F.2d 538 (3d Cir. 1984), rev'd, 475 U.S. 534 (1986) 10
Brandon v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) 10
E.I. du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 9
Garnett v. *Renton School Dist.*, 865 F.2d 1121 (9th Cir. 1989), amended Mar. 3, 1989, and May 15, 1989 . . . . . 7, 10, 11, 12
Hazelwood School Dist. v. *Kuhlmeier*, 108 S. Ct. 562 (1988) 4
Lubbock Civil Liberties Union v. *Lubbock Ind. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983) 10
Nartowicz v. *Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984) 10
Widmar v. *Vincent*, 454 U.S. 263 (1981) 4, 6, 9

Constitution and statutes: Page

U.S. Const.:
Amend. I:
Establishment Clause 3, 5, 6, 7, 9, 11
Free Speech Clause 5, 7, 8
Free Exercise Clause 5

Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V 1987) 2
20 U.S.C. 4071(a) (Supp. V 1987) 2
20 U.S.C. 4071(b) (Supp. V 1987) 2
20 U.S.C. 4071(d)(5) (Supp. V 1987) 2
20 U.S.C. 4071(d)(7) (Supp. V 1987) 2
20 U.S.C. 4071(f) (Supp. V 1987) 2
20 U.S.C. 4072(3) (Supp. V 1987) 2, 9
20 U.S.C. 4072(4) (Supp. V 1987) 12

28 U.S.C. 2403(a) 4

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1597

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 867 F.2d 1076. The opinion of the district court (Pet. App. B1-B30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1989. The petition for a writ of certiorari was filed on March 30, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Equal Access Act (EAA), 20 U.S.C. 4071 *et seq.* (Supp. V 1987), makes it unlawful for any public secondary school that receives federal financial assistance and that has a "limited open forum" to "discriminate[] against any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings" (20 U.S.C. 4071(a) (Supp. V 1987)). The Act provides that a "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time" (20 U.S.C. 4071(b) (Supp. V 1987)). The Act defines "meeting" to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum" (20 U.S.C. 4072(3) (Supp. V 1987)). Finally, the Act provides that it should not be construed to authorize any governmental unit "to sanction meetings that are otherwise unlawful," "to abridge the constitutional rights of any person," or "to limit the authority of the school * * * to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary" (20 U.S.C. 4071(d)(5) and (7), 4071(f) (Supp. V 1987)).

2. Respondents include former and present students at Westside High School (WHS) in Omaha, Nebraska, who sought the permission of petitioners, the Board of Education and various Westside school officials, to form a Christian Bible Study Club at WHS (Pet. App. A3-A8). WHS receives federal funds (*id.* at A4). At WHS, approximately 30 student clubs and organizations meet after school hours on school property (*id.* at A4-A5). According to formal School Board policy, student clubs are "a vital part of the total educational program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills" (*id.* at B19). The policy further provides that "School-sponsored" organizations are "directly under the control of the school administration, and shall have faculty sponsorship" (*ibid.*). The policy excludes organizations sponsored by "any political or religious organization" or by "any organization which denies membership on the basis of race, color, creed, sex or political belief" (*ibid.*).

School district officials rejected the student respondents' proposal on the ground that allowing the Christian Bible Study Club in a public school would violate the Establishment Clause (Pet. App. A6). The School Board upheld the denial (*id.* at B4). According to the Board, the proposed club would violate Board policy, which limited use of school buildings to school-sponsored, curriculum-related activities (*id.* at A7).

3. The student respondents filed this lawsuit in the United States District Court for the District of Nebraska, in which they alleged that the action of the School Board and school district officials violated the students' rights under the First Amendment, the Equal Access Act, and the Nebraska Constitution (Pet. App. A7-A8). Petitioners argued in response that neither the First Amendment, the Equal Access Act, nor the Nebraska Constitution required the high school to sponsor the Christian Bible Study Club and to allow it to meet at the school. They also defended on the ground that the Establishment Clause prohibited such sponsorship and school meetings.

Pursuant to 28 U.S.C. 2403(a), the United States intervened for the purpose of defending the constitutionality of the Equal Access Act.[1]

At trial, the school principal and the superintendent for the school district testified that each of the existing school clubs was curriculum related. See Pet. App. B21-B22.[2] The school principal also testified that "WHS administrators are extremely concerned with exposing students to all sides of controversial issues" and that "permitting a sanctioned Christian group would stand in conflict with this policy" (*id.* at B24).

Following trial, the district court dismissed the student respondents' complaint (Pet. App. B1-B30). The court concluded that "WHS has not created a limited open forum as that term is used in the [Equal Access Act] or in the Supreme Court's analysis in *Widmar* [v. *Vincent*, 454 U.S. 263 (1981)] and *Hazelwood* [*School Dist.* v. *Kuhlmeier*, 108 S. Ct. 562 (1988)]" (Pet. App. B25). The court found that "WHS has only sparingly permitted, outside of the classroom setting, the use of school facilities for political, social or economic discussions" and that "those clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution" (*id.* at B25-B26). Because the court agreed with petitioners that

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[1] The United States did not address in the lower courts the threshold question whether the EAA's equal access requirement applied to WHS.

[2] The student respondents contended that ten clubs were not curriculum-related. Among these ten were the chess club, Subsurfers (a scuba diving club), the photography club, and Interact and Zonta (two service clubs). See Pet. App. B20-B22.

the Equal Access Act's equal access requirement therefore did not apply, the court did not address petitioners' further contention that the Establishment Clause mandated petitioners' denial of school access to the students' proposed club (*id.* at B26 n.5).

The district court also rejected the student respondents' contention that the First Amendment's Free Speech and Free Exercise Clauses supported equal access to the proposed Christian Bible Study Club (Pet. App. B26-B29). The court concluded that petitioners' "goal of presenting a balanced view when political, religious and economic information is dispensed within WHS facilities" is "a legitimate educational concern which reasonably justifies WHS's actions in this case" (*id.* at B28).

Finally, referring to the trial testimony of one of the student respondents and of the school principal, the district court stated that petitioners "are free to exercise their religious beliefs and engage in informal religious discussions at school" (Pet. App. B28-B29). According to the court, moreover, "[a]ny attempt by WHS to prohibit such informal meetings or exchanges between students, before or after instructional time, and even using school rooms or cafeteria tables, subject, of course, to reasonable time, place and manner restrictions would meet strong constitutional objection" (*id.* at B29). The court indicated that it was "hold[ing] simply that WHS need not permit its facilities to be used by a school sanctioned Christian club" (*ibid.*).

4. The court of appeals reversed (Pet. App. A1-A21). Singling out the chess club, the court found that the existing school clubs were not all curriculum-related and that the district court's contrary view rested on a "broad interpretation of 'curriculum-related' [that] would

make the EAA meaningless" (*id.* at A12; see *id.* at A14). Under the district court's view, the court of appeals explained, a high school could avoid the federal statute's equal access requirement by "simply declar[ing] that it maintains a closed forum and choos[ing] which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal" (*ibid.*).

The court rejected petitioners' contention that the EAA violates the Establishment Clause (Pet. App. A14-A20): Agreeing with respondents and the United States, the court reasoned that "the EAA codifies the Supreme Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), * * * extending that holding to secondary public schools" (*id.* at A15) and "[a]ny constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students" (*id.* at A19). The court concluded, however, that *Widmar* could not be validly distinguished on that ground because "Congress considered the difference in the maturity level of secondary students and university students before passing the EAA" (*id.* at A19-A20). The court added that even in the absence of the EAA it would reach the same result "under *Widmar* alone" because "the facts in the case before us are the same as the facts in *Widmar* except for the setting" (*id.* at A20).

ARGUMENT

This case presents important questions concerning both the meaning and the constitutionality of the Equal Access Act. In our view, the court of appeals ruled correctly that the EAA, where it applies, is constitutional. Although that decision does not squarely conflict with the

decision of any other court of appeals, the reasoning of the lower court is in substantial tension with that of a recent decision of a panel of the Ninth Circuit in *Garnett* v. *Renton School Dist.*, 865 F.2d 1121 (1989), amended, March 3, 1989, and May 15, 1989. Given the importance of the questions presented and the divergent perspectives on the Act already reflected in the courts of appeals, further review by this Court may be warranted. On balance, however, we believe that the issues presented by the enactment of the EAA could profit from further development by the lower courts. In the absence of a square circuit conflict, and especially in light of the fact that a petition for rehearing and suggestion for rehearing en banc are still pending in *Garnett*, we therefore believe that further review by this Court in this case would be premature.

1. In *Bender* v. *Williamsport Area School Dist.*, 469 U.S. 1206 (1985), this Court granted certiorari to consider a dispute similar to the one at issue in this case. In *Bender*, the controversy was framed entirely in constitutional terms, namely, whether the Free Speech Clause requires or, conversely, the Establishment Clause forbids a public secondary school to allow religious student organizations to meet at the school. The Court did not reach the merits in *Bender*, however, because the respondent in that case had no standing to take an appeal to the court of appeals and therefore the court of appeals lacked jurisdiction to hear that appeal. See 475 U.S. 534 (1986).[3] This case raises similar constitutional questions

[3] A similar jurisdictional defect is not present here. In *Bender*, the only party to file a notice of appeal (a member of the School Board) "ha[d] no personal stake in the outcome of the litigation

but in a different context because the students in this case, unlike those in *Bender*, base their claim on the Equal Access Act (which was passed after the court of appeals decision in *Bender*) in addition to the Free Speech Clause.

The injection of EAA claims into litigation over the rights of religious student organizations to meet at public secondary schools is significant for several reasons. First, it raises difficult issues of statutory construction not presented in *Bender*. Congress chose not to define in the EAA the equal access requirement's statutory trigger ("noncurriculum related student groups"). The resulting ambiguity about the scope of the Act's application presents questions both about the proper interpretation of the Act's language and about the degree of deference owing to the determinations of local school officials. Those questions would benefit from being allowed "to mature through full consideration by the courts of appeals"

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and therefore did not have standing to file the notice of appeal" (475 U.S. at 543-544). In this case, the student plaintiffs who filed a notice of appeal did have the requisite "personal stake in the outcome of the litigation." Moreover, the possibility of the student plaintiffs' graduating from WHS does not appear to present immediate standing problems. Because all but one of the original student plaintiffs had graduated by the time of the appeal to the Eighth Circuit, plaintiffs' counsel filed a motion to add additional student plaintiffs who will not graduate for several years (see Pet. 17 n.4). That motion, which was pending at the time of the writing of the petition in this case (see *ibid.*), was granted by the court of appeals on March 28, 1989.

(*E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977)).[4]

Second, the questions of statutory construction presented by the Equal Access Act and the question of the Act's constitutionality are interrelated. The Act's constitutionality depends on the fact that its equal access requirement is triggered only where a "limited open forum" exists at secondary schools subject to the Act. Hence, resolution of the Act's constitutionality would itself benefit from the court of appeals' "full consideration" of the threshold issues of statutory construction.

Third, the EAA is significant because it reflects Congress's judgment that a distinction between university students and secondary students is not warranted for Establishment Clause purposes in this setting – a question impliedly left open by this Court in *Widmar* v. *Vincent*, 454 U.S. 263, 274 n.14 (1981). The courts of appeals that had previously held that the Establishment Clause bars student religious organizations from meeting at public secondary schools have generally not had an opportunity to revisit that issue in light of this congres-

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[4] The only guidance in the statutory language on the meaning of "noncurriculum related" is in the EAA's definition of "meeting" in terms of activities of student groups "not directly related to the school curriculum" (20 U.S.C. 4072(3) (Supp. V 1987)).

sional judgment.[5] The possible impact of the EAA on those courts is thus not yet known.

2. To date, only two federal courts of appeals have decided claims brought in part under the EAA: the Eighth Circuit in this case and the Ninth Circuit in *Garnett* v. *Renton School Dist.*, 865 F.2d 1121 (1989), amended, March 3, 1989, and May 15, 1989, petition for rehearing and suggestion for rehearing en banc pending. Although those cases involved similar facts, the courts of appeals reached different results and utilized inconsistent reasoning.

In this case, the Eighth Circuit held that the secondary school (WHS) had to provide access to a Christian Bible Study Club equal to that which the school was then providing to other clubs, including the chess club, that the court held were "noncurriculum related" (Pet. App. A11-A14). Indeed, the court concluded that the district court's contrary interpretation of "noncurriculum related" "would make the EAA meaningless" (Pet. App. A12). In *Garnett*, however, the Ninth Circuit held that the EAA's equal access requirement did not apply because the existing school clubs, including the chess club, "are so closely related to course work or are so integral a part of the traditional and official school programs that they

[5] See, *e.g.*, *Bell* v. *Little Axe Ind. School Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Bender* v. *Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), rev'd on other grounds, 475 U.S. 534 (1986); *Nartowicz* v. *Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984); *Lubbock Civil Liberties Union* v. *Lubbock Ind. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).

cannot reasonably be termed 'noncurriculum related'" (slip op. 5187 (as amended May 15, 1989)).[6]

Moreover, although the Ninth Circuit in *Garnett* held that the EAA was inapplicable, and thus did not have occasion to determine whether it is constitutional, the court nevertheless ruled (slip op. 5179) outside the context of the Act that "[a]llowing the requested meeting of this particular student religious group in a public high school classroom at a time closely associated with the school day" (before the school day) would violate the Establishment Clause. The court's reasoning in reaching that conclusion is inconsistent with the Eighth Circuit's reasoning in this case. The Ninth Circuit relied in part on its perception that the classrooms in the high school at issue in *Garnett*, "unlike the facilities considered in *Widmar*, are not a public forum for student expression" (slip op. 5185). But the court more directly grounded its Establishment Clause ruling on its view that *Widmar* was distinguishable: "The same considerations that mandate special vigilance in preventing religious establishments in public schools – the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals – distinguish public secondary schools from public universities" (slip op. 5182). In coming to the opposite conclusion in this case – that is, in ruling that no valid distinction can be drawn between the uni-

[6] In both this case and *Garnett*, all existing clubs had faculty sponsors (see Pet. App. B20-B23; *Garnett*, slip op. 5187). And in both cases, high school officials testified that the existing clubs were all curriculum related (*ibid.*). In *Garnett*, the district court made the further finding that none of the existing clubs was "student initiated or student directed" (slip op. 5187).

versity and secondary school settings in this context – the Eighth Circuit expressly acknowledged, but declined to embrace, the Ninth Circuit's different view (see Pet. App. A19-A20 & n.3).[7]

3. There is, however, no direct conflict between the decisions of the two courts of appeals. The Eighth Circuit has held in this case that the EAA applies to one high school, and that it is constitutional as applied; the Ninth Circuit has held in *Garnett* that the EAA does not apply to another high school and thus did not expressly reach the question of the Act's constitutionality. Although the general curriculum at the two schools appears to be similar, and the types of student organizations overlap, the disagreement between the courts of appeals over the application of the Act cannot be directly attributed to any specific disagreement over the meaning of the Act's terms, as opposed to a disagreement over how those terms should be applied in specific circumstances. And although the Ninth Circuit appears to be willing to afford more deference to the determination of local school officials of what is curriculum related, in the end both courts recognized that deference can extend only so far and that a court cannot abdicate its responsibility to determine the meaning of "noncurriculum related" for EAA purposes (Pet. App. A12-A13; *Garnett*, slip op. 5187).

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[7] The Ninth Circuit's apparent concern with allowing a student religious club to meet in a public high school "just before the start of classes" would not be allayed by the EAA's defining of "noninstructional time." Such time is defined as "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends" (20 U.S.C. 4072(4) (Supp. V 1987)).

In addition, the ultimate extent of the conflict between the two circuits is uncertain because the Ninth Circuit's ruling is still subject to revision. The Ninth Circuit has twice amended its opinion since it was first issued last January, and a petition for rehearing and suggestion for rehearing en banc remain pending before that court. Until the Ninth Circuit has disposed of that petition, further review by this Court of the apparent inconsistencies between the Eighth Circuit's ruling here and the Ninth Circuit's in *Garnett* would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.[8]

Respectfully submitted.

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[8] Alternatively, the Court could hold the petition in this case pending the Ninth Circuit's disposition of the petition for rehearing and suggestion for rehearing en banc in *Garnett*.

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No. 88-1597 (6)

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IN THE

Supreme Court of the United States

October Term, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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20pp

Table of Contents

I. THE PETITION ACCURATELY DESCRIBED THE FACTS OF THIS CASE 1

A. The Informal Meeting Issue. . . 2

B. The Impressionability Issue . . 9

II. THE ISSUES SHOULD BE DECIDED NOW, NOT DEFERRED INDEFINITELY . .12

Conclusion 16

Table of Authorities

Cases

Bender v. Williamsport Area School Dist.
475 U.S. 539 (1986) 10

Buffalo Bd. of Educ. v. Burr
11097/88 (Sup. Ct. Erie County 1989) 1

Edwards v. Aguillard
107 S. Ct. 2575 (1987). 10

Epperson v. Arkansas
393 U.S. 97 (1968). 11

Garnett v. Renton Area School Dist.
865 F.2d 1121 (9th Cir. 1989) . 1,14

Grand Rapids City School Dist. v. Ball
473 U.S. 373 (1985) 10,11

Hazelwood School Dist. v. Kuhlmeier
108 Sup. Ct. 562 (1988) 8

Hunt v. Board of Ed., 321 F.Supp.
1263 (S.D.W.Va. 1971) 13

Johnson v. Huntington Beach Union H.S.
68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977) 13

Lynch v. Donnelly
465 U.S. 668 (1984) 10

PEARL v. Nyquist,
413 U.S. 756 (1973) 11

Roemer v. Bd. of Public Works
426 U.S. 736 (1976) 10

Tilton v. Richardson
403 U.S. 672 (1971) 11

Trietly v. Bd. of Educ., 65 A.D.
2d 1, 409 N.Y.S. 2d 912
(4th Dept., 1978) 13

Wallace v. Jaffree
472 U.S. 38 (1985). 10

Widmar v. Vincent,
454 U.S. 263 (1981) 12

Court Rules

Sup. Ct. R. 21.5 2

The continued uncertainty over the legal status of religious clubs in the public high schools described in the Petition for Certiorari, the briefs in opposition, and the various briefs amici, together with subsequent case law developments,[1] make the grant of a writ of certiorari appropriate in this case.

I. THE PETITION ACCURATELY DESCRIBED THE FACTS OF THIS CASE

Only one argument advanced by individual respondents calls for a response - the suggestion in Point I,B,

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[1] The petition for mandamus sought in Buffalo Bd. of Educ. v. Burr (Petition at p. 20, n.6) was denied. However, without opposition from the School Board, a state court subsequently entered a preliminary injunction requiring the School Board to allow a religious club to meet. Bd. of Educ. v. Burr, No. 11097/88 (Sup. Ct., Erie County 1989). The Ninth Circuit has twice modified its opinion in Garnett v. Renton Area School Dist., 865 F.2d 1121 (9th Cir. 1989), and is still considering a petition for rehearing en banc.

of their brief in opposition that, pursuant to Sup. Ct. R. 21.5, certiorari should be denied because petitioners "seriously misstate the facts of this case." Only two specific instances are cited, one relating to petitioners' position toward informal religious speech, and the other concerning impressionability of high school students. The evidence marshalled in support of the charge does not sustain it, for the Petition accurately summarized the record on both these issues.

A. The Informal Meetings Issue

Respondents claim that testimony [Brief in Opposition at 17], of Dr. Findley,[2] principal of Westside High

---

[2] Respondents, relying on a caption in the trial transcript, mistakenly label this the testimony of Dr. Tangdall. An examination of the prior page, as well as the deposition itself, reveals that the disputed testimony is that of Dr. Findley.

School, that a non-sanctioned religious club would not be permitted to meet regularly in "one of the classrooms," contradicts the statement in the Petition (p. 6) that school officials were willing to tolerate informal religious meetings. The record belies that charge.

Dr. Findley did not testify that only religious clubs meeting regularly in a classroom would be banned; rather his testimony was that no non-sponsored student group, regardless of focus, could meet regularly in a classroom. Immediately after testifying that a non-sponsored religious group could not meet regularly in a classroom, there was the following exchange between Dr. Findley and respondents' attorney:

> Q. If the subject matter was what you would consider not religious, what would you do?

(Tr. 638).[3]

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[3] References to the trial transcript

A. If they regularly met in the classroom?

Q. Yes.

A. I would not let them meet.

Q. For what reason?

A. They wouldn't have a sponsor available. We do not have during our regular day meetings. We discourage kids meeting in open classrooms. We have study centers for them to go to because we do not have a sponsor person for them.

Far from being a content based rule against religious speech, the rule prohibiting regular meetings of unsponsored student groups in classrooms is a neutral "time, place or manner" restriction.

Individual respondents knew that school officials would not interfere with their informal religious meetings.

_____

are given as Tr. _____.

Respondent Mergens testified:

> Q. Miss Mergens, do you ever recall Dr. Findley [the school principal] or Dr. Tangdall [assistant superintendent of schools] having stated to you or in your presence that if you had just gone ahead and met and not said anything to anybody, that this whole thing wouldn't have happened and we wouldn't have a case here today or it wouldn't have gone as far as it had gone?
>
> A. Yes. Dr. Findley mentioned that to me. I don't know if it was a big formal statement or if it was just, "Well, if you wouldn't have said anything to us, it would be okay."
>
> Q. If you just hadn't said anything and gone ahead and met -- .
>
> A. Right.
>
> Q. -- some place in the school?
>
> A. Exactly.

Other witnesses, both students and administrators, testified to the same

effect, or that school officials made no effort to interfere with non-sponsored informal religious conversations. See, e.g., Tr. at 53-54, 67 (Mergens); 98 (Simmonds); 114, 122-23 (Kellison); 148 (Harris); 215-16 (Hilt); 295 (Findley); 426-27, 429-30 (Tangdall); 605, 621 (Findley).

To buttress their claim that non-sponsored informal religious speech was not permitted, respondents cite the testimony of the school's activities director, Dr. Huston. Supposedly responding to the question whether informal religious speech was tolerated, respondents quote Dr. Huston's testimony as [Brief in Opposition of 17] "I don't think it's [sic] probably appropriate for us as public school, nonsectarian to permit that." [Tr. 530-31].

A comparison of respondents' report of this testimony with the

transcript reveals that the "mis-statements" exist because the testimony has been wrenched out of context:

> Q. Do you recall in the deposition that I asked you the question, I said, "Question: the same situation, if they were to meet in the commons area during a free period and gathered together and sit around in a circle and freely discuss religious topics, maybe even have a Bible out and have somebody there, you know, sharing something from the Bible?"
>
> And your answer was:
>
> "Answer: I would probably recommend to the Principal that we wouldn't permit it. He would have to make a decision as to whether or not we would.
>
> Question: And what grounds would you recommend to the Principal that he not permit it?
> Answer: I don't think it's probably appropriate for us as public school, non-sectarian, to permit that." --
>
> (emphasis added).

The principal, Dr. Findley, made his own decision, rejecting Dr. Huston's

"recommendation" and informing Mergens that informal religious meetings were acceptable. In fact, Dr. Huston's deposition was introduced by respondents in order to demonstrate a conflict with his trial testimony to the effect that he would not interfere with informal religious activities during lunch, so long as they were not disruptive. [Tr. 528-53]

School officials drew a line between purely private speech -- which was permitted regardless of content -- and speech sponsored or sanctioned or reasonably understood as sponsored or sanctioned by school authorities -- which they prohibited, unless part of a program school officials wished to integrate into the curriculum. That is precisely the line this Court authorized school officials to draw in Hazelwood School

District v. Kuhlmeier, 108 S.Ct. 562 (1988).

B. The Impressionability Issue

The second supposed factual misstatement is said to be petitioners' suggestion "that the issue of impressionability remains open in this case." [Brief in Opposition at 18-19]. Nowhere do either the individual respondents or the United States challenge the accuracy of the summary of the testimony relating to this issue. And notwithstanding this Court's "two-court" rule on factual issues, the question of impressionability is hardly one of historical fact controlled by the "factual findings" below on this issue.

The question of impressionability, (which relates to the legal "effect" of the granting of recognition to student religious clubs) has not been treated by this Court as one of "historical fact"

subject to the clearly erroneous rule of F.R.Civ.P.52a, but as one of "judicial interpretation of social facts," open to plenary review. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring). See also Edwards v. Aguillard, 107 S.Ct. 2573, 2577 (1987) Cf. Grand Rapids City School Dist. v. Ball, 473 U.S. 373, 390 (1985); Lynch v. Donnelly, 465 U.S. 668 (1984); Roemer v. Bd. of Public Works, 426 U.S. 736 (1976).

Plainly enough, some courts, and several justices of this Court, believe that high school students are not so impressionable that they would confuse sanction of student religious clubs with school endorsement of religion. Bender v. Williamsport Area School Dist., 475 U.S. 534, ____ (1986) (Burger, C.J., dissenting); _____; (Powell, J. dissenting). But as demonstrated by the many

decisions in the lower courts refusing to uphold the "equal access" concept (and the innumerable decisions of this Court finding high school students impressionable for Establishment Clause purposes),[4] this is hardly a self-evident proposition.

What remains in this case then, are not factual disputes or misstatements of the record, but precisely the issues raised in the Petition: whether the Equal Access Act compels school officials to sanction a Christian Bible Club over their considered educational judgment that it is not suitable for integration into the public school curriculum, and whether, if it does, the Act violates the Establishment Clause.

---

[4] See e.g., Edwards v. Aguillard, supra; Grand Rapids City School Dist. v. Ball, supra; Epperson v. Arkansas, 393 U.S. 97 (1968); PEARL v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672, 685-86 (1971).

These issues are presented clearly in this case, notwithstanding individual respondents' last minute efforts to obfuscate the factual record.

II. THE ISSUES SHOULD BE DECIDED NOW, NOT DEFERRED INDEFINITELY

The Solicitor General agrees that "this case presents important questions concerning both the meaning and the constitutionality of the Equal Access Act." Brief in Opposition at 6. He urges, however, that while review "may be appropriate," these issues "could profit from further development by the lower courts." We disagree.

Whether the equal access concept, enunciated at the college level in Widmar v. Vincent, 454 U.S. 263 (1981), ought to -- and can constitutionally -- be extended to the nation's secondary schools has been extensively debated in the case law, in the Congress, in various

public forums and in legal and educational journals, both before and after the Widmar decision. Hunt v. Board of Educ., 321 F. Supp. 1263 (S.D.W.Va. 1971); Trietly v. Board of Educ., 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (4th Dept. 1978); Johnson v. Huntington Beach Union H.S., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (1977). Whatever the impact the Equal Access Act has on the constitutional analysis it is not the sort of issue in which the practical experience of school administrators or of lower courts is likely to shed much additional light in view of the extensive public debate on this score. And the question of statutory interpretation is no more likely to be illuminated by the experience of the next five years than it has been in the five years that have elapsed since the Act's enactment. The statute exists; no regulations are

authorized or contemplated; the legislative history (to the extent relevant) is written and available; and the question ought to be decided.

The continued uncertainty about the constitutionality and meaning of the Equal Access Act leaves school officials in an unenviable position. Whichever way they turn, those disappointed by the decision can sue the school, alleging a plausible constitutional or statutory claim. Admittedly, the Equal Access Act is not a model of the legislative draftman's art, but there are only two possible approaches to the statutory issue presented here and they are illuminated by the decisions in this case and in Garnett v. Renton Area School Dist., supra.

The further development in the lower courts urged by the Solicitor is merely an invitation for school boards to

waste further human and financial resources in pursuit of an answer to the very questions before the Court now. Given that every school board in the country has more pressing demands on its resources than litigation -- and hardly needs the controversy religion clause litigation inevitably generates -- the Solicitor's invitation to encourage the diversion of those resources to yet more litigation just for the sake of creating more litigation should be declined.

Conclusion

For the reasons stated, the petition should be granted.

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No. 88-1597

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

The Board of Education of the Westside Community Schools (Dist. 66) et al.,

Petitioners,

v.

Bridget C. Mergens, et al.,

Respondents.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) moves this Court for leave to participate as amicus curiae

herein for the purpose of filing the attached brief.

NSBA is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who compose this nation's school boards are elected or appointed community representatives, most of whom are not professional educators. They are responsible under state law for the fiscal management, staffing, continuity, and the educational and curriculum standards of the public

schools.

Most of the public school districts in the country receive federal financial assistance and, therefore, are subject to the requirements of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989).

Respectfully submitted,

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE.....	1
REASONS FOR GRANTING THE WRIT.....	3
ARGUMENT.....	3
CONCLUSION.....	21

TABLE OF AUTHORITIES

CASES:	Page
Abington School District v. Schemp, 374 U.S. 203 (1983).....	4
Aguilar v. Felton, 473 U.S. 402 (1985).....	5
Bell v. Little Axe Independent School District No. 76 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985).....10,	17
Bender v. Williamsport, 741 F.2d 538 (3rd Cir. 1984), 475 U.S. 523 (1986).....	passim
Bethel School Dist. v. Fraser, 106 S.Ct. 3169 (1986).....	19, 22
Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981).....	12
Clark v. Dallas Independent School District, 671 F.Supp. 1119 (N.D. Tex. 1987), amended, 701 F.Supp. 594 (N.D. Tex. 1988), app. pending, No. 88-1681 (5th Cir. 1989).....	15
Engel v. Vitale, 370 U.S. 421 (1962).....	4

Garnet v. Renton School District No. 403, 865 F.2d 1121 (9th Cir. 1989)..... 18

Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562 (1988) 20, 21, 22

Lemon v. Kurtzman, 403 U.S. 602 (1971)..... 6, 7, 12

Lubbock Civil Liberties Union v. Lubbock Independent School Dist., 669 F.2d 1038, reh'g denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983)..... 7, 12

McCollum v. Board of Education, 333 U.S. 203 (1948)..... 4

Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984)..... 8

School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985)..... 5

Stone v. Graham, 449 U.S. 39 (1980)..... 4

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969)..... 5

Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989)..... 20

Wallace v. Jaffree, 472 U.S. 38 (1985)..... 4

Widmar v. Vincent, 454 U.S. 263 (1981)..... passim

STATUTES:

Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989)..... 2, 16, 23

OTHER AUTHORITIES:

United States Const. amend. I..... 3

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AMICUS CURIAE BRIEF OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

INTEREST OF THE AMICUS CURIAE

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of

Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Nearly all public school districts receive federal financial assistance and, therefore, are subject to the requirements of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989).

School boards and school district administrators across the country need guidance from this Court as to whether they may, or must, allow student religious groups to meet during the school day. As the law now stands, a school's only safe alternative is to

refuse to allow any club or organization to meet during the school day in order to assure that the school does not violate the constitutional or statutory rights of any child.

REASONS FOR GRANTING THE WRIT

1. A conflict exists in the circuits on the question of whether Widmar v. Vincent applies to elementary and secondary schools.

2. It is unclear as to whether the Equal Access Act, which applies to all school districts that receive federal financial assistance, conflicts with the establishment of religion clause of the first amendment to the U.S. Constitution.

ARGUMENT

Until this Court's decision in Widmar v. Vincent, 454 U.S. 263 (1981), the law was clear that public schools that allow prayer in the schools violate

the Constitution's proscription against establishment of religion. See, e.g., McCollum v. Board of Education, 333 U.S. 203 (1948) (religion classes as part of school curriculum); Engel v. Vitale, 370 U.S. 421 (1962) (reciting in classrooms prayer written by state); Abington School District v. Schemp, 374 U.S. 203 (1963) (scripture reading and reciting Lord's Prayer in classrooms); Stone v. Graham, 449 U.S. 39 (1980) (posting of Ten Commandments in classrooms). Since Widmar the Court has continued to rule that the Constitution forbids prayer in the public schools. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (moment of silence).

Ironically, although the Court has yet to rule whether religious groups can meet on public school grounds, in 1985 this Court held that public school

teachers cannot provide educational services to students on religious school premises. Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of City of Grand Rapids v. Ball, 473 U.S. 373 (1985). In Grand Rapids the Court implied that teachers too, are impressionable "and may well subtly (or overtly) conform their instruction to the [religious] environment in which they teach..." 473 U.S. at 388.

Prior to 1981 school boards could feel safe in denying the use of school facilities for religious meetings during the school day, even if other student groups were allowed to meet. However, this Court's decisions in two cases changed this certainty. In 1969 in the case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), this Court ruled that students

have free speech rights in the classroom; and then in 1981 in Widmar v. Vincent, this Court held that religious speech is equally protected by the first amendment. School officials then became uncertain as to their obligations with regard to the use of school facilities by religious groups.

This uncertainty increased when in 1984 Congress relied on Widmar in passing the Equal Access Act, 20 U.S.C. §§ 4071-4074. Religious groups have since cited both Widmar and the Act when urging the opening of schools to their meetings.

Courts that have distinguished the Widmar decision from cases involving secondary schools have done so using one or more of three rationales: 1) the presence of a religious purpose (the first prong of the three-prong test in Lemon v. Kurtzman, 403 U.S. 602 (1971));

2) the impressionability of pre-college age students (the primary effect test in Lemon); 3) the presence of a closed forum in public secondary schools, thus precluding a free speech right. While these decisions may provide some schools with grounds for excluding student religious group meetings, their results are at odds with the mandates of the Equal Access Act. Furthermore, not all courts have agreed that these distinctions justify denying student religious groups access to school premises.

1. The presence of a religious purpose.

In Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038. reh'g denied, 680 F.2d 424 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983), the Fifth Circuit held that

the school district established religion because the board policy allowing students to gather before and after school for a variety of purposes, including religious ones, was designed to bring religion into the schools. The court noted that the Lubbock School District had engaged in religious practices such as scripture reading over the public address system, teacher led classroom prayer and Bible distribution since 1971. Thus, the court found that the policy failed the first part of the three prong analysis established in Lemon v. Kurtzman.

In Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984), the Eleventh Circuit pointed to the school district's overall practice of supporting religious activities such as religious assemblies, religious signs and

announcements of church-sponsored events as an important consideration in upholding the trial court's grant of a preliminary injunction prohibiting the district from permitting a student religious group to meet on school property after school hours under faculty supervision. The court cautioned, however, that in evaluating the application for a permanent injunction, the district court should assess whether the district has an "equal access" policy, the extent of faculty sponsorship and other factors relating to the creation of a perception in the minds of the students that the school district is either "supporting" or merely "accommodating" religion.

Both of these cases were decided before the Equal Access Act, but there is no reason to believe that the decisions

would have been different if decided today.

In Bell v. Little Axe Independent School District No. 76 of Cleveland County, 766 F.2d 1391 (10th Cir. 1985), the Tenth Circuit reached a similar result, holding that although the district had created a limited open forum, its behavior belied its avowed secular purpose. In that case, the court held that the Equal Access Act did not apply because the school involved was not a "secondary school" within the meaning of the Act. However, the court's discussion of "limited open forum" indicates that it would have ruled in the same manner had the Act been found to apply.

In the case at bar, however, it appears that the lower court believes that the intent of the school district is

irrelevant. When determining whether a religious group should be allowed to meet on school premises, nothing in either the Equal Access Act or the decision below considers the school district's history with regard to attempts to bring religious practices or teachings into the schools. Under both the Act and the decision below, if the school operates a limited public forum, it must allow religious groups to participate on an equal basis.

It is important that the Supreme Court decide whether the Equal Access Act is constitutional with regard to religious groups and, if so, whether it should be applied in all cases, regardless of the intent of the school officials in allowing religious meetings in their schools.

2. Impressionability of school children.

A number of cases distinguish Widmar v. Vincent on the basis of the impressionability of pre-college age children. In effect, these cases are saying that, at the elementary and secondary level, an equal access policy that allows religious clubs to meet on school grounds during the school day has a "religious effect" that violates the second prong of the Lemon v. Kurtzman test.

Both Lubbock, and Brandon v. Board of Education, 635 F.2d 941 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), discussed the impressionability of school children. But both decisions also found that the "equal access" policy had a religious motive.

In Bender v. Williamsport, 741 F.2d

538 (3d Cir. 1984), 475 U.S. 534 (1986), the court of appeals held that although there was a secular purpose in establishing an activities period in which any student club could participate, the "primary effect" of allowing religious groups to meet during that time would enhance religion. The court based its finding entirely on a belief that secondary school students are impressionable and that the school board would send a "message of government endorsement of religion" by permitting student religious groups to meet in the school. This Court ruled that the petitioner did not have standing to appeal to the court of appeals and, therefore, let stand the district court ruling requiring the school to allow the religious group to meet.

It should be noted that four

Justices dissented from the finding of no standing and would have ruled on the merits. The dissenters believed that Widmar controlled the issues in the Bender case and required that the student religious group be granted equal access to the activity period. Justice Powell in particular noted his opinion that the distinction based on the impressionability of high school students was questionable in "this age of massive media information" and did not justify departing from Widmar in the high school context. If nothing else, Justice Powell's comments raise questions as to the continuing strength of the impressionability argument. Yet lower courts continue to use it as does this Court in other first amendment cases.

Even where courts do not mention "impressicnability," they imply that the

Equal Access Act does not apply where allowing the religious group to meet would have a primary effect of establishing religion. The Equal Access Act itself contains no such exception.

In Clark v. Dallas Independent School Dist., 671 F.Supp. 1119 (N.D. Tex. 1987), amended, 701 F.Supp. 594 (N.D. Tex. 1988), app. pending, No. 88-1681 (5th Cir. 1989), the court, citing Widmar v. Vincent and the court of appeals decision in Bender v. Williamsport Area School District, noted that it may be possible to reconcile the constitutional right to free speech with the constitutional proscription against establishment of religion by weighing the interests at stake and determining "which clause should prevail in a given environment . . . The environment at issue here is that of the public

secondary school, with its unique concern for non-sectarian neutrality." 671 F.Supp. at 1124. The court held that under the circumstances in that case the school was correct in refusing to allow religious meetings after they became loud and resulted in attempts to proselytize other students, apparently on the ground that to allow the group to continue to meet would have the primary effect of establishing religion because of the closed school environment. The court refused to apply the Equal Access Act because "the Act would require an unconstitutional result." The court later, on motion of the United States Government, amended its decision to provide that the Equal Access Act does not apply to the facts of this case and that it expressed no opinion as to the Act's constitutionality. 701 F.Supp. 594

(N.D. Tex. 1988).

3. Limited public forum.

In Widmar there was no issue of whether the university operated an open forum since the university plainly acknowledged that its facilities were open to all student groups except religious ones. However, in secondary school cases since then the courts have conflicted on whether the existence of a limited public forum is a relevant consideration. In Bell v. Little Axe Independent School District No. 76 of Cleveland County, the court noted that the district was operating a limited public forum. Nevertheless, the court held that allowing a religious club to meet violates the establishment clause because of the religious intent of the school district.

In Bender v. Williamsport, the court

of appeals held that the district was operating a limited public forum but since the establishment of religion clause stands on a higher plane than the free speech clause, the district could not allow religious groups to meet.

Even those cases that hold that there is no limited open forum imply that the question of forum is not relevant because allowing student religious groups to meet during the school day violates the establishment clause. See, e.g., Garnet v. Renton School District No. 403, 865 F.2d 1121 (9th Cir. 1989).

In contrast, the lower court cases that follow Widmar and the Equal Access Act itself all are predicated on a finding that the school operates a "limited open forum," thus necessitating a determination as to whether a club or activity is curriculum or non-curriculum

related. In the case at bar the court found that the school officials incorrectly designated certain clubs as curriculum-related. That determination raises the issue of the propriety of a court questioning the reasonable educational judgment of the school officials in designating clubs as curriculum-related and non curriculum-related.

This Court has declared on a number of occasions that it is not the province of the courts to make educational decisions. In Bethel School District v. Fraser, 106 S.Ct. 3159 (1986), the Ninth Circuit Court of Appeals held that the school district violated a student's first amendment rights by using its "white middle class standards" to determine whether a student's speech to a student assembly was appropriate. This

Court held that school officials, not the courts, should make judgments with regard to school functions.

In Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988), the Court overturned the lower court's judgment that the school principal violated first amendment rights by censoring student articles in a school newspaper. The lower court decision asserted that the articles on student pregnancy and the effect of divorce on students were indeed appropriate social issues to be covered in a student newspaper. This Court reversed, stating that schools have the right to censor student newspapers based on "reasonable pedagogical" grounds.

Recently, the Eleventh Circuit in the case of Virgil v. School Board of Columbia County, 862 F.2d 1517 (11th Cir.

1989), following this Court's decision in Hazelwood, held that the school board's decision to remove a humanities textbook from the curriculum was based on a reasonable pedagogical reason, although the court disagreed with the school district's decision.

In this case, the court below has made its own determination as to whether the clubs are curriculum-related. One might reasonably disagree with the school's determination as to whether a particular club is curriculum related; however, as long as the school officials' decision is based on a reasonable pedagogical rationale, it does not seem appropriate for the courts to second-guess that decision.

This Court should decide whether the existence of a limited open forum requires that student religious groups be

granted access to school facilities and if so, the appropriate standard for determining whether a school district has created such a forum. If the determination is to turn on whether or not the groups are curriculum-related, then the deference given to school officials' decisions in other free speech cases such as Fraser and Hazelwood may be appropriate. Certainly the court below did not follow that standard and failed to specify what standard it did follow. Apparently, the court below believes that an activity is "curriculum-related" only if it is tied to the court's own idea of traditional school subjects.

CONCLUSION

School boards and school administrators are used to treading narrow legal lines where the state of the law is less than clear. Through an

excess of caution they can usually obey the law while accomplishing their educational mission. Here that may be impossible. Even were the case law on the constitutional issues completely clear, now that the Congress has passed a law enunciating a federal right, school people cannot defend a suit by a religious group which has been refused the right to meet on school grounds on the basis that extant case law prohibits that action. They must sail the waters between the Scylla of the establishment of religion clause and the Charybdis of the Equal Access Act, a collision with either resulting in a judgment for damages and attorneys' fees under 42 U.S.C. §§ 1983 and 1988.

Until this Court definitively decides this issue, the law will remain unclear to the benefit of no one, except perhaps the lawyers.

Respectfully submitted,

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No. 88-1597

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners

v.

BRIDGET C. MERGENS, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR TARA LYNN BURR, ET AL., AND RICHARD GARNETT, ET AL., AS AMICI CURIAE IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether allowing public school students to meet before or after school in an empty classroom for voluntary, student-initiated religious discussions, Bible study, and prayer, on equal terms with other student groups, violates the Establishment Clause of the First Amendment.

2. Whether prohibiting public school students from meeting before or after school in an empty classroom for voluntary, student-initiated religious discussions, Bible study, and prayer, on equal terms with other student groups, violates the Equal Access Act, 20 U.S.C. 4071-4074, the Free Speech or Free Exercise Clauses of the First Amendment, or the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES:	Page
Bender v. Williamsport Area School District, 475 U.S. 534 (1986)	5
Board of Education v. Burr, No. 11097/88 (filed Nov. 15, 1988)	*passim*
Board of Education of the Westside Community Schools v. Mergens, 867 F.2d 1076 (8th Cir. 1989)	4
Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981)	6
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983)	6
Nartowicz v. Clayton County School District, 736 F.2d 646 (11th Cir. 1984)	6
Perumal v. Saddleback Valley Unified School District, No. 88-340, *cert. denied*, 109 S. Ct. 327 (1988)	5
Garnett v. Renton School District No. 403, 865 F.2d 1121 (9th Cir. 1989), *petition for rehearing en banc pending*	*passim*
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)	6
Trietley v. Board of Education, 409 N.Y. Supp. 2d 912 (1978)	6
Widmar v. Vincent, 454 U.S. 263 (1981)	5, 6
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
U.S. Constitution, First Amendment	*passim*
Equal Access Act, 20 U.S.C. 4071-4074	*passim*
LEGISLATIVE HISTORY:	
130 Cong. Rec. S8337-S8366 (daily ed. June 27, 1984)	7
130 Cong. Rec. H7734-35 (daily ed. July 25, 1984)	7

IN THE

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BRIDGET C. MERGENS, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR TARA LYNN BURR, ET AL., AND RICHARD GARNETT, ET AL., AS AMICI CURIAE IN SUPPORT OF THE PETITION

INTEREST OF AMICI CURIAE

1. Tara Lynn Burr, Kenneth Dudek, and James Huggins are public high school students attending McKinley High School in Buffalo, New York. They requested to meet together after school in an empty classroom for a voluntary, extracurricular Bible study club on the same terms as other voluntary student organizations in the school. Their school district responded by filing suit against them (individually and as representa-

tives of other students who might wish to participate in such a group), in the Supreme Court for the State of New York, *Board of Education* v. *Burr*, No. 11097/88 (filed Nov. 15, 1988), seeking a declaratory judgment on the constitutionality and applicability of the Equal Access Act. The school district contended that the current state of the law is "so unsettled" that it would be subject to a lawsuit, whether it granted or denied the request. (Complaint, ¶ 12). Prior to initiating suit, however, the school district denied permission to the students to meet on school property on the ground that such meetings violate the Establishment Clause of the First Amendment. In affidavits filed with the suit papers and in subsequent proceedings, the school district has maintained, even in the absence of any prior challenge to the Equal Access Act in the Second Circuit, that it is "neutral" as to the ultimate result of the litigation, but that it vigorously contests the constitutionality of the Equal Access Act. On April 18, 1989, a preliminary injunction was granted (without formal opinion) allowing the students to meet. The case is presently in the discovery phase.

2. Richard Garnett, Scott Germino, Robert Ryan, and Richard Tracy are public high school students attending Lindberg High School in Renton, Washington. They requested permission to meet together before school in an empty classroom, on an equal basis as other noncurricular student groups, to discuss religious and moral issues, read the Bible, and pray. Upon final refusal by the school district, the students filed suit in United States District Court for the Western District of Washington, claiming violation of their rights under the Equal Access Act and the First Amendment. The district court denied their motion for a preliminary injunction and entered judgment in favor of the school district. On appeal, a panel of the United States Court of Appeals for the Ninth Circuit affirmed, several weeks prior to the Eighth Circuit's decision in this case. *Garnett v. Renton School District No. 403*, 865 F.2d 1121 (9th Cir. 1989). On January 30, 1989, the students filed a petition for rehearing with a suggestion for rehearing *en banc*. The Ninth Circuit has not yet acted on the petition for rehearing.

3. The purpose of this brief is to draw the Court's attention to the continuing controversy in high schools and lower courts across the nation over voluntary, student-initiated religious discussions on the premises of public schools even in the face of a federal statute governing the matter. While amici submit that the carefully considered policies established by the Congress in the Equal Access Act are fully constitutional, and that the decision of the United States Court of Appeals for the Eighth Circuit in this case was correct, we nonetheless urge this Court to grant the writ of certiorari and resolve this important question.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The factual circumstances in the instant case closely resemble those in Buffalo and Renton, where *amici* are involved in litigation against their school districts. The common factual elements include the following:

(1) The meetings at issue were initiated solely by students and were to be conducted either before or after school by students, with strictly voluntary participation and with no encouragement or control by the schools. In no case would participation be graded or be the basis for receiving school credit.

(2) The policy or practice of each school was to permit students to form organizations and to meet on the premises of the school for a wide variety of purposes.

(3) In each case, the students requested that they be treated in the same way as other student groups, with

the sole exception that they did not request an active school "sponsor" (though they were willing, if school authorities requested it, to have a teacher or other adult attend for purposes of maintaining order).

(4) In each case, school officials refused to allow the students to meet,[1] and the sole ground for the refusal was the content of their intended speech. In no case was the refusal based on any content-neutral time, place, or manner regulation.

(5) In each case the school district officials claimed that it would violate the Establishment Clause to allow the students to meet.

(6) In each case, the school district officials also defined every *other* student club as "curriculum-related" and claimed to limit the "forum" to "curriculum-related" clubs. The clubs so defined as "curriculum-related" included chess clubs (in all three cases[2]), sports clubs (scuba diving in *Mergens*, skiing and bowling in *Renton* and *Burr*), and social, cultural, or civic clubs (Interact and Zonta in *Mergens*, Special Kiwanis Youth, Girls'

[1] Petitioners' statement of the case asserts that Bridget Mergens, *et al.* (the students) "had been meeting informally for religious speech for some time when the request was made" (Pet. 5) and that principal James Findley "told Mergens that the school had no objection to the continuation of the group's informal meetings" (Pet. 6). The petition contains no record citations, and in our review of the record we have been unable to find support for these statements. Perhaps "informed meetings" refers to the ability to talk together in the hallways or in the cafeteria during lunchtime without censorship. We believe the record is clear that the students in this case, like the students in the Buffalo and Renton cases, were never permitted to meet in empty classrooms or other appropriate locations, as other student groups were permitted to do.

[2] During the pendency of this controversy, school officials in *Renton* renamed the chess club the "Advanced Strategy and Tactics Club," apparently in order to make it appear more "curriculum-related."

Club, and Minority Student Union in *Renton*, and Students Against Drunk Driving in *Burr*).[3]

REASONS FOR GRANTING THE WRIT

The petition raises two important issues of First Amendment law concerning freedom of speech, religion, and public education, issues that have persisted, notwithstanding a federal statute addressing the matter. The first is whether the Establishment Clause requires that school districts discriminate against student speech on the basis of religious content, by singling them out for exclusion from a limited forum made available for student speech and association on other subjects. Three Justices of this Court voted to grant certiorari in a case presenting this issue earlier this Term. *Perumal* v. *Saddleback Valley Unified School District*, No. 88-340, *cert. denied*, 109 S. Ct. 327 (1988). This Court granted certiorari on this issue in *Bender* v. *Williamsport Area School District*, 457 U.S. 534 (1986), but did not reach the merits because of a jurisdictional defect.

Recent decisions of the Eighth Circuit (in the instant case) and the Ninth Circuit (in *Renton*) are in direct conflict on this issue, on almost identical facts. The Eighth Circuit noted that this Court has rejected the claim that allowing university student religious groups to meet on an equal basis violates the Establishment Clause. See *Widmar* v. *Vincent*, 454 U.S. 263 (1981). The court reasoned that the only constitutionally relevant distinction between high school students and university students is that the former are "less mature" and therefore potentially more likely to perceive a posture of neutrality as an endorsement of religion (Pet. App. 19 n.2).

[3] School district officials in the *Burr* case take the position that every one of some 277 student clubs on the school districts' 1987-1988 roster is "not non-curriculum-related" even though this includes such clubs as "Dungeons and Dragons." See Plaintiff's Reply to Defendants' Amended Answer and Counterclaim, ¶ 32, at 9.

The court rejected this distinction, both on the basis of Congress's findings when it passed the Equal Access Act, and on its own evaluation of the facts of the case. Pet. App. 19-20. By contrast, the Ninth Circuit held that "[t]he impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals—distinguish public secondary schools from public universities." *Renton*, 865 F.2d at 1126.

Moreover, as noted in the petition for certiorari, there is a serious conflict between the determination of Congress on this issue in passing the Equal Access Act, which was upheld by the court of appeals in this case, and the decisions of several other lower federal and state courts in cases predating the Act. *See, e.g., Nartowicz* v. *Clayton County School District*, 736 F.2d 646 (11th Cir. 1984) (establishment clause prohibits voluntary student religious meetings); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (same); *Brandon* v. *Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154 (1981) (same); *Trietley* v. *Board of Education*, 409 N.Y. Supp. 2d 912 (1978) (same).

The second question is whether the rights of public high school students under the Equal Access Act or under the First Amendment include the right to meet together for voluntary speech during nonschool hours in school facilities generally made available to students during such times. See *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969); *Widmar* v. *Vincent*, 454 U.S. 263 (1981).

Under the Equal Access Act, any public school that maintains a "limited open forum" is forbidden "to deny equal access or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the

speech at such meetings." 20 U.S.C. 4071. The Act defines a "limited open forum" as an "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." *Id.*, § 4071(b). The legislative history contains many examples of what Congress considered "noncurriculum related" groups for purposes of the statute. These include camera clubs, sports clubs, service clubs (such as "Key Clubs"), stamp clubs, business clubs, chess clubs, and social or cultural clubs. See 130 Cong. Rec. S8337-S8366 (daily ed. June 27, 1984); 130 Cong. Rec. H7734-35 (daily ed. July 25, 1984).

Petitioners contend, and the Ninth Circuit held, that school districts must have broad discretion to determine which student clubs are "curriculum-related." *Renton*, 865 F.2d at 1127. By contrast, the Eighth Circuit below observed:

> Allowing such a broad interpretation of "curriculum-related" would make the EAA [Equal Access Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA.

Pet. App. 12. The experience of *amici* is that school authorities can, and will, manipulate the concept of "curriculum-related" so as to find every club whose speech they approve of "curriculum-related," and those whose speech they deem inappropriate "unrelated." As the Eighth Circuit recognized, the Equal Access Act requires an objective, judicially reviewable standard for determining when a school has established a limited open forum. Of course, school districts have the authority to determine the contours of their own curriculum. But it

is *Congress's* understanding of the term "noncurriculum-related" that must control statutory construction.

The division among the lower courts has become a serious source of confusion, manipulation, and acrimony. While *amici* believe that the decision below is correct, we also believe, along with students and school administrators involved in needless conflicts in other parts of the country, that it is time for these questions to receive an authoritative resolution. The instant case is representative of the facts and issues presented in others. Accordingly, *amici* urge this Court to grant the petition for a writ of certiorari, at which time *amici* wish to present further briefing going to the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 11, 1989

No. 88-1597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L, Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing; Matt Schulz; Ingrid Kimmons; Jason Brone; Jennifer Waggoner; and Allison Wells,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

Page

Relevant Docket Entries

Court of Appeals 1

District Court 6

Order of Judgment--Court of Appeals .. 10

Order of Judgment--District Court 12

Opinion--Court of Appeals (reproduced in Petition for a Writ of Certiorari -

Opinion--District Court (reproduced in Petition for a Writ of Certiorari - Appendix B)

Pleadings and Preliminary Orders

Complaint 14

Answer to Complaint 37

Order on Final Pretrial Conference 55

Order in Supplementation of Pretrial Order 68

Page

Transcript of Trial on April 8-9 and 14-15, 1987

Testimony of Bridget C. Mergens
Direct 71
Cross 98
Redirect 109
Recross 112
Redirect 114

Testimony of Andrea Dawn Simmons
Direct 115
Cross 128
Redirect 130

Testimony of Kendra Kellison
Direct 131
Cross 137

Testimony of Michelle Marie Harris
Direct 143
Cross 154
Redirect 158

Testimony of Kevin Earl Brown
Direct 158

Testimony of Bryan Phillip Rensing
Direct 162
Cross 175
Redirect 178
By the Court 180

Testimony of Kevin Dale Coates
Direct 180

Page

Testimony of Derek Neil Stoneburg
Direct 185

Testimony of Jennifer Renee Hilt
Direct 189

Testimony of Lisa Ann Healy
Direct 195
By the Court 206

Testimony of Jeffrey Thomas Ramsell
Direct 208

Testimony of Richard Paul Hustig
Direct 212
By the Court 215

Testimony of James E. Findley, Ph.D.
Direct 216
By the Court 287

Testimony of James A. Tangdall, Ph.D.
Direct 289
Cross 327
Redirect 330
By the Court 331
Redirect 335
Recross 337
By the Court 338
Redirect 340

Testimony of Kenneth K. Hansen, Ph.D.
Direct 341

Page

Testimony of Ronald F. Huston
Direct 354
Cross 374

Testimony of David Moshman, Ph.D.
Direct 379

Testimony of Ward Sybouts, Ph.D.
Direct 400
Cross 412
Redirect 417

Testimony of James E. Findley, Ph.D.
Direct 419
Cross 429
By the Court 434
Recross 441

Testimony of James A. Tangdall, Ph.D.
Direct 442

Testimony of Bridget Colleen Mergens
Direct 450

Testimony of James E. Findley, Ph.D., from deposition 451

Trial Exhibits

Exhibit 54--School Board Policy 7260, Use of School Facilities .. 455

Exhibit 55--School Board Policy 7260 (rev. 1982), Use of School Facilities 456

Page

Exhibit 59 School Board Policy 6180, Recognition of Religious Beliefs and Customs 462

Exhibit 60--School Board Minutes 3-4-85 464

Exhibit 61--Affidavit of James E. Findley in Opposition to Request for Preliminary Injunction 468

Exhibit 63--List and Description of Student Activities 479

Exhibit 71--School Board Policy 5610, Student Clubs and Organizations 488

Exhibit 72--School Board Policy 5450, Freedom of Expression 489

Exhibit 76--Affidavit of James A. Tangdall in Opposition to Request for Preliminary Injunction 490

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Bridget C. Mergens, By & Through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by & through his next of friend, Mrs. Judith L. Hollar; Brian P. Rensing, by & through his next of friends, Robert W. & Sherry K. Rensing; David K. Harris, by & through his next of friends Kenneth & Myra Harris, and, Andrea Simmonds, by & through her next of friends, Robert L. & Linda L. Simmonds,

APPELLANTS

U.S.A. Intervenor-Plaintiff Below

Kendra K. Kellison, etc. by and through her Next of Friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her Next of Friends, Kenneth Harris and Myra Harris; Kevin Brown, etc. by and through his next of Friends Robert W. Rensing and Sherry K. Rensing,

APPELLANTS

Matt Schulz; Ingrid Kimmons; Jason Brune; Jennifer Waggoner and Alison Wells added as APPELLANTS per ORDER of March 28, 1989.

APPELLANTS

vs.

The Board of Education of the Westside Community Schools (Dist. 66) Wayne W. Meier, President of the Westside Community

School Board; James E. Findley, Principal of Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District & Kenneth K. Hansen, Superintendent of the Westside Community School District,

APPELLEES

CASE NO. 88-1227NE

RELEVANT DOCKET ENTRIES

DATE	FILINGS PROCEEDINGS	PLEADING NUMBER
1988		
Feb. 11	DOCKETED APPEAL	(1)
Apr. 11	BRIEF OF INTERVENOR (United States) 7 copies serv. 4/8/88	(10)
Apr. 25	BRIEF OF APPELLANT w/ Addendum w/ser 4/22 7 copies	(13)
June 17	BRIEF OF APPELLEES w/ser 6/16/88 7 copies	(18)
July 5	REPLY BRIEF w/ser 7/1 7 copies	(19)
Sept. 2	**SET FOR ARGUMENT** IN OCTOBER IN ST. PAUL	

Oct. 5	MOTION to add additional plaintiffs/appellants To Court	(20)
Oct. 17	ARGUED AND SUBMITTED BEFORE CHIEF JUDGE LAY AND JUDGES F. GIBSON AND McMILLIAN IN ST. PAUL. Douglas W. Davis for the Appellant; Brant M. Laue for the Intervenor/Appellant (Split Arg). Allen E. Daubman for the appellee. RECORDED.	
1989		
Feb. 8	OPINION BY McMILLIAN PUBLISHED.	(22)
Feb. 8	JUDGMENT: Judgment of the district court is reversed in accordance with the opinion of this Court.	(23)
Feb. 17	APPELLANTS' BILL OF COSTS. w/service.	(24)
Feb. 17	APPELLANTS' MOTION FOR ATTORNEY FEES. w/service.	(25)
Feb. 21	APPELLANTS' MOTION FOR CLARIFICATION of court's position as to pl/aplnts' motion to add additional	

pl/aplnts filed _ 10/4/88. (31)

Feb. 22 APPELLEES' MOTION for stay of mandate pending application to the Sup. Ct. for writ of cert. (32)

Feb. 23 RESPONSE requested to motion for clarification.

Mar. 6 RESPONSE of aplees to mot. for clarification. w/service. (34)

Mar. 3 OBJECTION by appellees to bill of costs. w/service. (35)

Mar. 3 APPELLEES OBJECTION TO MOT FOR ATT. FEES. (39)

Mar. 3 APPELLANTS' mot. in opposition to mot for stay of mandate. (40)

Mar. 28 ORDER: Appellant Mergens' motion to add additional appellants to the above-entitled action is granted. The title of this case shall be amended to show the following individuals as appellants in the lawsuit: Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Waggoner

& Alison Wells. Ruling on bill of costs & motion for attorney fees will be held in abeyance pending disposition by the Supreme Court of the U.S. of appellees' timely-filed petition for writ of cert. Stay of mandate will be granted until April 27, 1989. If by that date the Clerk has not received notification from the Sup. Ct. that a timely petition for writ of cert has been filed, the Clerk shall bring this case to the attention of the Court for further entry of order on fees and costs. (42)

Apr. 6 RECD copy of Pet. for Writ of Certiorari fm. aplee

Apr. 7 NOTICE OF FILING of pet. for writ of cert. to the Sup. Ct. of the U.S. as case no. 88-1597 dated 3/30/89 (43)

July 5 CERTIFIED COPY OF ORDER OF THE Sup. Ct. granting certiorari in case no. 88-1597 dated 7/3/89 (44)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, By and Through Her Next Friend, Dr. Daniel N. Mergens, STEPHEN P. HOLLAR, By and Through His Next Friend, Mrs. Judith L. Hollar, BRIAN P. RENSING, By and Through His Next of Friends, Robert W. and Sherry K. Rensing, DAVID K. HARRIS, By and Through His Next of Friends, Kenneth and Myra Harris, and ANDREA SIMMONDS, By and Through Her Next of Friends, Robert L. and Linda L. Simmonds,

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (District 66), WAYNE W. MEIER, President of the Westside Community School Board, JAMES E. FINDLEY, Principal of Westside High School, JAMES A. TANGDALL, Assistant Superintendent of the Westside Community School District, and KENNETH K. HANSEN, Superintendent of the Westside Community School District,

Defendants.

CIVIL ACTION NO. 85-0-426

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1985		
Apr. 17	1.	Complaint w/req/ for Jury Trial at Omaha. Issued Summons - handed to P's counsel.
	1.	Complaint w/req. for Jury Trial at Omaha. Issued Summons - handed to P's Counsel.
May 10	14.	Motion of United States of America To Intervene as Party Pl, with attachment.
	16.	Ctrm. Min. b/4 CAB - Hrg. on P's Mot. for Prel. Inj. - submitted.
May 23	21.	Order (CAB) that Ps' Req. for Prel. Inj. #1 is denied.
June 3	22.	Answer of Ds to Ps' Complaint.
Aug. 22	43.	U.S.A.'s Complaint in Intervention.
	44.	Dfs' Answer to Complaint In Intervention.
Oct. 4	54.	P's Mot. for SJ.
Nov. 6	64.	Order (CAB) - IT IS ORDERED as follows: 1. Pls' motion (filing 52)

is granted instanter. 2. Pls' motion (filing 54) is denied.

65. Pls' Amended Complaint.

66. Dfs' Answer to Amended Complaint.

1986

Jul 7 — 92. P's w/drawal of jury trial demand.

Nov 26 — 104. Order on final PTC held 11-26-86; (RCP) Trial 3-87.

105. Order in Suppl. of PTO (RCP) Ds' Obj. to 10 students, denied; Ps' Mot. (#102) for leave to designate out of time expert witnesses is granted; w/in 10, Ps to suppl. ans. to interrob. (sic), etc. further depos. disc. to be ext. to 3-14-87; etc. Copies mailed to counsel.

1987

Mar 31 — 109. Ps' amended PTO.

Apr 8 — 113. Ctrm Min CAB; Trial Cont'd.

Apr 9 — 114. Ctrm Min CAB; Trial Cont'd.

Apr 14 — 121. Courtroom Minutes - trial on 4-9-87, trial continued to 4-14-87 at 1:30 p.m.

Apr 14 — 122. Crtrm. Min. trial (CAB) continued 4/15/87 a.m.

Apr 16 — 123. Ctrm. Min. b/4 CAB - Oral Arg. & Final Arguments - submitted; briefing schedule set.

1988

Feb 2 — 126. Memo (CAB).

127. Order (CAB) that Judgment should be entered in favor of Defs; that Ps complaint is dismissed. Copies mailed.

Feb 3 — 128. P's Not of appeal w/cert of serv. Copy mailed to Peggy Casper.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Bridget C. Mergens, By & Through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by & through his next of friend, Mrs. Judith L. Hollar; Brian P. Rensing, by & through his next of friends, Robert W. & Sherry K. Rensing; David K. Harris, by & through his next of friends Kenneth & Myra Harris, and, Andrea Simmonds, by & through her next of friends, Robert L. & Linda L. Simmonds,

APPELLANTS

U.S.A. Intervenor-Plaintiff Below

Kendra K. Kellison, etc. by and through her Next of Friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her Next of Friends, Kenneth Harris and Myra Harris; Kevin Brown, etc. by and through his next of Friends Robert W. Rensing and Sherry K. Rensing,

APPELLANTS

Matt Schulz; Ingrid Kimmons; Jason Brune; Jennifer Waggoner and Alison Wells added as APPELLANTS per ORDER of March 28, 1989.

APPELLANTS

vs.

The Board of Education of the Westside Community Schools (Dist. 66) Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District & Kenneth K. Hansen, Superintendent of the Westside Community School District,

APPELLEES

CASE NO. 88-1227NE

ORDER

This appeal from the United States District Court was submitted on the record of the District Court, briefs of the parties, and was argued by counsel. After consideration, it is hereby ordered and adjudged that the judgment of the District Court is reversed in accordance with the opinion of this Court.

DATED February 8, 1989.

(The opinion of the Court of Appeals omitted in printing. It is reproduced in the Petition for a Writ of Certiorari - Appendix A.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, et al.,	)	CV 85-0-426
Plaintiffs,	)	
vs.	)	**ORDER**
THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,	)	
Defendants.	)	

In conformance with the Memorandum of this date,

IT IS ORDERED as follows:

1. Judgment should be and hereby is entered in favor of the defendants.

2. The plaintiffs' complaint should be and hereby is dismissed.

DATED this 2nd day of February, 1988.

(The opinion of the District Court omitted in printing. It is reproduced in the Petition for a Writ of Certiorari - Appendix B.)

BY THE COURT:

/s/C. Arlen Beam
C. ARLEN BEAM
U.S. District Judge
Sitting by Special Designation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, By and Through Her Next Friend, Dr. Daniel N. Mergens, STEPHEN P. HOLLAR, By and Through His Next Friend, Mrs. Judith L. Hollar, BRIAN P. RENSING, By and Through His Next of Friends, Robert W. and Sherry K. Rensing, DAVID K. HARRIS, By and Through His Next of Friends, Kenneth and Myra Harris, and ANDREA SIMMONDS, By and Through Her Next of Friends, Robert L. and Linda L. Simmonds,

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (District 66), WAYNE W. MEIER, President of the Westside Community School Board, JAMES E. FINDLEY, Principal of Westside High School, JAMES A. TANGDALL, Assistant Superintendent of the Westside Community School District, and KENNETH K. HANSEN, Superintendent of the Westside Community School District,

Defendants.

CIVIL ACTION NO. 85-0-426

JURY TRIAL DEMANDED

PLAINTIFFS' COMPLAINT AND APPLICATION FOR INJUNCTIVE AND DECLARATORY RELIEF

COMES NOW, Bridget C. Mergens, a minor, by and through her Next of Friend, Dr. Daniel N. Mergens; Steven P. Hollar, a minor, by and through his Next of Friend, Judith L. Hollar; Brian P. Rensing, by and through his Next of Friends, Robert W. and Sherry K. Rensing; David K. Harris, a minor, by and through his Next of Friends, Kenneth and Myra Harris; and, Andrea Simmonds, by and through her Next of Friends, Robert L. and Linda L. Simmonds, Plaintiffs herein, complaining of The Board of Education of The Westside Community Schools, Wayne W. Meier, James E. Findley, James A. Tangdall, and Kenneth K. Hansen, hereinafter referred to as Defendants, and would respectfully show unto the Court the following:

I

THE PARTIES

1. Plaintiffs are residents and citizens of Omaha, Douglas County, Nebraska.

2. The Westside Community Schools (District 66), is an independent school district, organized and existing under the Constitution and Laws of the State of Nebraska, for public secondary school

purposes, and is managed, governed and controlled by the Defendant, The Board of Education of the Westside Community Schools, its president, Wayne W. Meier.

3. Defendant, Wayne W. Meier, a resident of Douglas County, Nebraska, is the President of The Board of Education of Westside Community Schools and is sued in his individual and official capacity pursuant to Nebraska Reissue Revised Statutes 79-452 to 79-455. He may be served with summons and notice at 909 S. 76th Street, Omaha, Nebraska 68114 and at 2226 Ridgewood Avenue, Omaha, Nebraska 68124.

4. Defendant, James E. Findley, a resident of Douglas County, Nebraska, is the Principal of Westside High School, and is sued in his individual and official capacity. He may be served with summons and notice at 3110 S. 104th Street, Omaha, Nebraska 68124, and at 8701 Pacific Street, Omaha, Nebraska 68114.

5. Defendant, James A. Tangdall, a resident of Douglas County, Nebraska, is

the Assistant Superintendent of Schools for Westside Community Schools and is sued in his individual and official capacity. He may be served with summons and notice at 7426 Spring Street, Omaha, Nebraska 68124, and at 909 South 76th Street, Omaha, NE 68114.

6. Defendant, Kenneth K. Hansen, a resident of Douglas County, Nebraska, is the Superintendent of Schools for Westside Community Schools and is sued in his individual and official capacity. He may be served with summons and notice at 10806 Larimore Avenue, Omaha, Nebraska 68164, and at 909 South 76th Street, Omaha, NE 68114.

II

JURISDICTION

7. Jurisdiction over the claim is conferred by 28 U.S.C. §§ 1331, 1343 and 1344 and 42 U.S.C. §§ 1983, 1985 and 1988 and arises under the First and Fourteenth Amendments to the United States Constitution and The Equal Access Act, Pub. L. No. 98-377, 98 Stat. 1302 (1984). Declaratory relief is authorized by 28

U.S.C. §§ 2201 and 2202 and Rule 587, FRCP.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391.

III

NATURE OF THE DISPUTE

9. This is a civil action for declaratory and injunctive relief and for damages and attorneys fees for violation of the Constitution and Laws of the United States. Plaintiffs, on behalf of themselves and others similarly situated, seek a declaration that the refusal of the Defendants to permit a wholly student-initiated non-denominational fellowship group to meet before or after school at Westside High School, while permitting other groups comprised of students to use the school's facilities, violates the First Amendment of The Constitution of the United States and the equal protection clause of the Fourteenth Amendment of The Constitution of the United States including Plaintiffs' right to free speech, freedom of assembly and association, free exercise of religion and the establishment clause therein,

Article I of the Nebraska Constitution, specifically Section 1 thereof dealing with equal rights and Section 4 thereof dealing with religious freedom, as well as the Civil Rights Act and the Equal Access Act.

IV

FACTUAL BACKGROUND

10. Plaintiff Bridget C. Mergens, age 18, is a senior student duly enrolled at and attending Westside High School, Omaha, Douglas County, Nebraska, which is within the jurisdiction, authority and supervision of the Defendants. She brings this action by and through her Next of Friend, Dr. Daniel N. Mergens.

11. Plaintiff Stephen P. Hollar, age 17, is a junior enrolled at Westside High School. He brings this action by and through his Next of Friend, Judith L. Hollar.

12. Plaintiff Brian P. Rensing, age 17, is a sophomore enrolled at Westside High School. He brings this action by and

through his Next of Friends, Robert W. and Sherry K. Rensing.

13. Plaintiff David Harris, age 17, is a senior enrolled at Westside High School. He brings this action by and through his Next of Friends, Kenneth and Myra Harris.

14. Plaintiff Andrea Simmonds, age 18, is a senior enrolled at Westside High School. She brings this action by and through her Next of Friends, Robert L. and Linda L. Simmonds.

15. Westside Community Schools is a school district existing in Omaha, Nebraska, pursuant to Nebraska Reissue Revised Statutes of 1943, 79-101, et seq. As such, it is governed, managed and operated by a duly elected Board of Education charged with responsibility for administering the schools under its jurisdiction, including Westside High School. The school district and Westside High School receive federal financial assistance.

16. Defendant Kenneth K. Hansen is the Superintendent of Westside Community Schools and as such is the chief administrative officer of The Board of

Education of Westside Community Schools and the Executive Administrator of Westside Community Schools.

17. In January, 1985, Plaintiff Bridget C. Mergens met with Defendant James E. Findley, the Principal of Westside High School, and requested permission to form a club which would meet before or after school on the same basis as other school clubs. Plaintiff Bridget C. Mergens informed Findley that the club would be a Christian club and that the group wanted to meet under the guidelines formulated by the Equal Access Act. Findley stated that it sounded like a great idea but that it would not be permitted because under equal access, the school did not have an "open forum".

18. In early February, 1985, Plaintiff Bridget C. Mergens met with Defendant James Tangdall, the Assistant Superintendent for Westside Community Schools and requested permission to form a Christian club or fellowship group at Westside High School. He also informed Plaintiff Bridget C. Mergens that the

school did not have an "open forum" and that a group such as Plaintiff Mergens was proposing would not be permitted to meet.

19. In mid-February, 1985, Plaintiff Bridget Mergens met with and was informed by Defendants, Findley and Tangdall, that her request to form a Christian club had been discussed with Defendant, Hansen, and that Defendants, Hansen, Tangdall and Findley had all agreed that Plaintiff Mergens' request for a Christian fellowship group or club should be denied.

20. On March 4, 1985, after being regularly scheduled on the School Board agenda, Plaintiff Bridget C. Mergens petitioned The Board of Education for Westside Community Schools for permission to form a Christian fellowship group at Westside High School within the guidelines of the Equal Access Act. The Board of Education voted to uphold the decision of James E. Findley, Principal of Westside High School and the decisions of James A. Tangdall, Assistant Superintendent and Kenneth K. Hansen, Superintendent of Westside Community Schools and denied Plaintiff Bridget C. Mergens' request for

equal access. Plaintiffs attach as Exhibit "A" a copy of the Minutes of the Defendant Board of Education Meeting of March 4, 1985.

21. At all times in contacting the Defendants in this action, Plaintiff Bridget Mergens clearly stated that she did not desire preferential treatment for the proposed group. She clearly stated that she only wanted the same access to school facilities as is afforded other student groups within District 66.

22. Westside Community School District permits other groups, organizations and clubs composed of students to use its facilities. Indeed, the school district makes its facilities generally open to non-curriculum student groups before or after actual classroom instruction. In so doing, Westside High School has created a "limited open forum." Plaintiffs attach as Exhibit "B" a copy of a list of student groups currently in existence and

utilizing the facilities of Westside High School.

23. Upon information and belief, the Westside Community School District permits student clubs and/or groups to exchange ideas and opinions on topics of history, community service, cultural differences and personal growth and development.

24. Each of the Westside Plaintiffs desire and intend to participate in the Christian fellowship club or group requested by Plaintiff Mergens.

25. The club or group proposed by Plaintiff Mergens will not cause any disruption or interference with the school's work or the rights of other students to be secure and to be left alone.

26. No space or time limitations justify the Defendants' refusal. Indeed, the sole reason for Defendants' refusal is their belief that to permit a club with any religious overtones would violate the establishment clause of the First Amendment.

27. The Westside Plaintiffs have not requested and, indeed, do not desire the school district to promote, lead or participate in the meetings.

28. The Westside Plaintiffs have not requested and, indeed, do not desire to be treated any differently than other groups which meet under the forum created at Westside High School.

29. Defendant School Board, as part of its administrative functions, has established a number of regulations that apply to the District 66 school system. As Exhibit "C", Plaintiffs attach a copy of Policy 5450 which deals with Freedom of Expression; as Exhibit "D", Plaintiffs attach a copy of Policy 5610 which deals with Student Clubs and Organizations, and as Exhibit "E", Plaintiffs attach a copy of Policy 6180 which deals with the Recognition of Religious Beliefs and Customs.

30. Plaintiffs have attached Exhibits "A" through "E" inclusive and incorporate same herein by reference thereto.

COUNT I

31. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

32. Defendants' denial of the Westside Plaintiffs (sic) request for permission to use school facilities, and prohibition of the meetings proposed by Plaintiff Mergens, on grounds of the religious content of the proposed meetings, violates the Plaintiffs' First Amendment right to freedom of speech without regulation or restriction by the State on the basis of the content of the speech and constitutes a prior restraint for which no reasonable justification exists.

COUNT II

33. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

34. Defendants' refusal to permit Plaintiffs to meet and assemble on school property violates their First Amendment right or association and to assembly.

COUNT III

35. Plaintiffs incorporate by reference

the allegations contained in paragraphs 1 through 30 above.

36. Plaintiffs are Christians who believe they have a right to perform all tasks in school to the glory of God, including the right to share with their fellow Christians how their religious faith aids them with their daily problems.

37. The rights and privileges requested by Plaintiffs for their proposed meetings are the same as the rights and privileges routinely afforded to other student groups, both curriculum and non-curriculum, that of expression of ideas regardless of the content of those ideas.

38. Defendants' refusal to allow Plaintiffs to hold their proposed meetings violates the Plaintiffs' right to the free exercise of their religious beliefs under the First Amendment to the Constitution of the United States, and constitutes a failure to give reasonable accommodation to the Plaintiffs' religious beliefs. This constitutes a prior restraint for which no reasonable justification exists.

COUNT IV

39. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

40. Defendants' actions violate the prohibition of the Establishment Clause of the First Amendment to the Constitution of the United States against State hostility toward religion.

COUNT V

41. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

42. Defendants' actions violate the Plaintiffs' right to the equal protection of the law under the Fourteenth Amendment to the Constitution of the United States because they discriminate against Plaintiffs based solely on the fact that Plaintiffs wish to engage in religious speech.

COUNT VI

43. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

44. Defendant Board of Education of the

Westside Community Schools' (District 66) policy regarding student clubs and organizations, which is incorporated in Policy No. 5610, violates the due process clause and equal protection clause of the Fourteenth Amendment, is unconstitutionally vague and is unconstitutional as applied to the facts of this case.

COUNT VII

45. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

46. Defendants' violation of Plaintiffs' constitutional rights under the First and Fourteenth Amendments of the United States Constitution also violates 42 U.S.C. § 1983.

COUNT VIII

47. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

48. Defendants (sic) denial of Plaintiffs' request to have a voluntary student initiated fellowship group or club at Westside High School while allowing other student groups to freely meet at

Westside High School constitutes a violation of the equal rights provision of the Nebraska Constitution, Article I, Section 1.

COUNT IX

49. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

50. Defendants' refusal to allow Plaintiffs to hold their proposed meetings is a violation by Defendants of Plaintiffs' rights to religious freedom under the Nebraska Constitution, Article I, Section 4.

COUNT X

51. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

52. Defendants have co-ordinated (sic) and co-operated (sic) among themselves to perform the actions alleged above, thus conspiring to discriminate against and violate the civil rights of the Plaintiffs in violation of 42 U.S.C. § 1985.

COUNT XI

53. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

54. Defendants' actions violate the Equal Access Act, Tit. VII, Pub. L. No. 98-377, 98 Stat. 1302, et seq. (1984).

COUNT XII

55. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

56. Defendants' denial of Plaintiffs' request to form a Christian fellowship group or club is a direct violation of Defendant School Board's Policy 5450 (Exhibit "D").

COUNT XIII

57. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 30 above.

58. Defendants' denial of Plaintiffs' request to form a Christian fellowship group or club is a direct violation of Defendant School Board's Policy 6180 which provides for a position of neutrality towards religion and religious beliefs.

COUNT XIV

59. Plaintiffs hereby request this Court to grant them injunctive relief to prevent the immediate and irreparable injury, loss or damage that will result if Defendants continue to refuse to permit Plaintiffs to exercise their rights guaranteed under The Constitution of The United States, The Nebraska Constitution, The Civil Rights Act and under The Equal Access Act. Plaintiffs have no adequate remedy at law for Defendants' violation of these rights.

COUNT XV

60. Plaintiffs further invoke the jurisdiction of this Court pursuant to the Federal Declaratory Judgment Act and ask this Court to order, adjudge and declare that the Defendants' policy of refusing to permit Plaintiffs to use the facilities of the school during non-instructional time violates the First and Fourteenth Amendments of the United States Constitution and the Equal Access Act. Plaintiffs further seek to be awarded their costs and reasonable attorneys' fees necessarily incurred in pursuing this

action pursuant to the Federal Declaratory Judgment Act and 42 U.S.C. § 1988.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs Bridget C. Mergens, by and through her Next of Friend, Dr. Daniel N. Mergens, Stephen P. Hollar, by and through his Next of Friend, Mrs. Judith L. Hollar, Brian P. Rensing, by and through His Next of Friends, Robert W. and Sherry K. Rensing, David K. Harris, by and through his Next of Friends, Kenneth and Myra Harris, and Andrea Simmonds, by and through her Next of Friends, Robert L. Simmonds and Linda L. Simmonds, pray that: (1) Defendants be cited to appear and answer herein; (2) this Court set for hearing Plaintiffs' Request for Preliminary Injunction at the earliest practical time consistent with justice and the Court's schedule and that upon hearing thereof, this Court issue its order enjoining the Defendants and each of them from refusing to permit Plaintiffs to conduct meetings or a club on school premises during non-instructional time, ordering Defendants to permit Plaintiffs

to conduct meetings or a club on the school premises during non-instructional time, enjoining Defendants from engaging in any activity or behavior which violates the Equal Access Act, enjoining Defendants from closing the school to other clubs, and enjoining the Defendants from punishing Plaintiffs in any way for the actions complained of herein until a final hearing on the merits thereof; (3) upon a final hearing, this Court declare that the policy of The Board of Education of the Westside Community Schools of denying equal access to and discriminating against the student initiated use of school facilities for non-denominational Christian fellowship group during non-instructional times is unconstitutional and void on its face and/or as applied; (5) award Plaintiffs nominal damages; (6) award Plaintiffs their reasonable attorneys' fees; and (7) award Plaintiffs all costs of Court, and such other and further relief, legal or equitable, general or special, to which they may show themselves justly entitled.

RESPECTFULLY SUBMITTED,

/s/Douglas Veith
DOUGLAS VEITH, Attorney #16771
PELTON, BERTOLINI,
SCHROEDER & VEITH
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CO-COUNSEL FOR PLAINTIFFS

(Affidavits of individual Plaintiffs, verifying facts alleged in Petition, omitted in printing.)

(Exhibit "1" to Complaint omitted in printing. It appears as Trial Exhibit 60 reproduced in relevant part at page 464 of this Appendix.)

TO: Homeroom Advisors: Please use this as a reference with your advisees. Meetings, tryouts, etc. are held throughout the year. Students should listen to announcements and keep apprised of these co-curricular opportunities.

FROM: Ron Huston

DATE: August, 1984

STUDENT ACTIVITIES

* * *

(The remainder of this Exhibit "B" omitted in printing. It appears as Trial Exhibit 63 reproduced at page 479 of this Appendix.)

EXHIBIT "B"

(Exhibit C to the Complaint omitted in printing. It appears as Trial Exhibit 72 reproduced at page 489 of this Appendix.)

(Exhibit D to the Complaint omitted in printing. It appears as Trial Exhibit 71 reproduced at page 488 of this Appendix.)

(Exhibit E to the Complaint omitted in printing. It appears as Trial Exhibit 59 reproduced at page 462 of this Appendix.)

(Certificate of Service omitted in printing.)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, By and Through Her Next Friend, Dr. Daniel N. Mergens, STEPHEN P. HOLLAR, By and Through His Next Friend, Mrs. Judith L. Hollar, BRIAN P. RENSING, By and Through His Next of Friends, Robert W. and Sherry K. Rensing, DAVID K. HARRIS, By and Through His Next of Friends, Kenneth and Myra Harris, and ANDREA SIMMONDS, By and Through Her Next of Friends, Robert L. and Linda L. Simmonds,

Plaintiffs,

vs.

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (District 66), WAYNE W. MEIER, President of the Westside Community School Board, JAMES E. FINDLEY, Principal of Westside High School, JAMES A. TANGDALL, Assistant Superintendent of the Westside Community School District, and KENNETH K. HANSEN, Superintendent of the Westside Community School District,

Defendants.

CIVIL ACTION NO. 85-0-426

**ANSWER OF DEFENDANTS
TO PLAINTIFFS' COMPLAINT**

Defendants allege and state the following for their Answer to plaintiffs' Complaint.

1. Defendants admit Paragraph 1 of the Complaint.

2. Defendants deny that part of Paragraph 2 of the Complaint which alleges that District 66 is managed, governed and controlled by Defendant Wayne W. Meier. Defendants admit all other allegations in said Paragraph 2.

3. Defendants admit that part of Paragraph 3 of the Complaint which alleges that Defendant Wayne W. Meier is a resident of Douglas County, Nebraska, and is the President of the Board of Education of the Westside Community Schools, District 66. Defendants deny all other allegations in said Paragraph 3. Defendants allege the NEB. REV. STAT. §§ 79-452 to 79-455 (REISSUE 1981) do not authorize suit against said Defendant in his individual and official capacity as alleged by Plaintiffs. Defendants further

allege that there exists no other factual or legal basis for suit against Defendant Wayne W. Meier in his individual capacity or in his official or representative capacity.

4. Defendants admit that part of Paragraph 4 of the Complaint which alleges that Defendant James E. Findley is a resident of Douglas County, Nebraska, and is the Principal of Westside High School. Defendants deny all other allegations in said Paragraph 4. Defendants allege that there exists no factual or legal basis for suit against Defendant James E. Findley in his individual capacity or in his official or representative capacity.

5. Defendants admit that part of Paragraph 5 of the Complaint which alleges that Defendant James A. Tangdall is a resident of Douglas County, Nebraska. Defendants deny that Defendant James A. Tangdall is a (sic) Assistant Superintendent, but allege that James A. Tangdall is the Associate Superintendent of Schools. Defendants deny all other allegations in said Paragraph 5.

Defendants allege that there exists no factual or legal basis for suit against Defendant James A. Tangdall in his individual capacity or in his official or representative capacity.

6. Defendants admit that part of Paragraph 6 of the Complaint which alleges that Defendant Kenneth K. Hansen is a resident of Douglas County, Nebraska, and is the Superintendent of Schools for Westside Community Schools. Defendants deny all other allegations in said Paragraph 6. Defendants allege that there exists no factual or legal basis for suit against Defendant Kenneth K. Hansen in his individual capacity or in his official or representative capacity.

7. With respect to Paragraph 7 of the Complaint, Defendants admit that this Court has subject matter jurisdiction.

8. With respect to Paragraph 8 of the Complaint, Defendants admit that venue is proper in this Court.

9. Defendants deny Paragraph 9 of the Complaint.

10. Defendants deny that Plaintiff Bridget C. Mergens is a senior enrolled and attending Westside High School. Defendants allege that said Plaintiff has graduated from Westside High School. Defendants admit all other allegations in said Paragraph 10.

11. Defendants deny that Plaintiff Stephen P. Hollar is currently a junior enrolled at Westside High School. Defendants allege that said Plaintiff has completed his junior year at Westside High School. Defendants admit all other allegations in said Paragraph 11.

12. Defendants deny that Plaintiff Brian P. Rensing is currently a sophomore enrolled at Westside High School. Defendants allege that said Plaintiff has completed his sophomore year at Westside High School. Defendants admit all other allegations in said Paragraph 12.

13. Defendants deny that Plaintiff David K. Harris is a senior enrolled at Westside High School. Defendants allege that said Plaintiff has graduated from

Westside High School. Defendants admit all other allegations in said Paragraph 13.

14. Defendants deny that Plaintiff Andrea Simmonds is a senior enrolled at Westside High School. Defendants allege that said Plaintiff has graduated from Westside High School. Defendants admit all other allegations in said Paragraph 14.

15. Defendants deny that part of Paragraph 15 of the Complaint which alleges that School District Number 66 and Westside High School receive federal financial assistance as contemplated by the Equal Access Act. Defendants admit all other allegations in said Paragraph 15.

16. Defendants admit that part of Paragraph 16 of the Complaint which alleges that Defendant Kenneth K. Hansen is the Superintendent of Westside Community Schools, School District Number 66. Defendants deny all other allegations in said Paragraph 16.

17. Defendants deny Paragraph 17 of the Complaint on the grounds that the allegations contained therein do not accurately describe the request made by Plaintiff Bridget C. Mergens and do not accurately describe the reasons for the denial by Defendant James E. Findley of the subject request.

18. Defendants deny Paragraph 18 of the Complaint on the grounds that the allegations contained therein do not accurately describe the request made by Plaintiff Bridget C. Mergens and do not accurately describe the reasons for the denial by Defendant James A. Tangdall of the subject request.

19. Defendants deny Paragraph 19 of the Complaint on the grounds that the allegations contained therein do not accurately describe the request made by Plaintiff Bridget C. Mergens and do not accurately describe the reasons for the denial of the subject request.

20. Defendants admit that part of Paragraph 20 of the Complaint which alleges that, on March 4, 1985, the Board

of Education voted to uphold the decision of Defendants James E. Findley, James A. Tangdall, and Kenneth K. Hansen. Defendants further admit that Exhibit A to the Complaint is a copy of the minutes of the Board of Education meeting of that date. Defendants deny all other allegations contained in said Paragraph 20 on the grounds that they do not accurately describe the request made by Plaintiff Bridget C. Mergens and the reason for the denial of the subject request.

21. Defendants deny Paragraph 21 of the Complaint.

22. With respect to Paragraph 22 of the Complaint, Defendants admit that Exhibit B is a true copy of a memo dated August, 1984, from Ron Huston to all Homeroom Advisors at Westside High School. Defendants deny all other allegations of said Paragraph 22.

23. With respect to Paragraph 23 of the Complaint, Defendants admit that students are allowed to exchange ideas and express opinions on any topic. Defendants allege that they do not engage and have

not engaged in any content-based discrimination. However, Defendants deny said Paragraph 23 for the reason that they disagree with Plaintiffs' characterization of the freedom of expression and speech permitted by Defendants.

24. Defendants deny Paragraph 24 of the Complaint.

25. Defendants deny Paragraph 25 of the Complaint on the grounds that the allegations are speculative.

26. Defendants deny Paragraph 26 of the Complaint.

27. Defendants deny Paragraph 27 of the Complaint.

28. Defendants deny Paragraph 28 of the Complaint.

29. Defendants admit Paragraph 29 of the Complaint.

30. Defendants admit Paragraph 30 of the Complaint.

31. For their answer to Paragraph 31 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

32. Defendants deny Paragraph 32 of the Complaint. Defendants allege that they did not engage at any time in content-based regulation, restriction or discrimination. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

33. For their answer to Paragraph 33 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

34. Defendants deny Paragraph 34 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

35. For their answer to Paragraph 35 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

36. Defendants deny Paragraph 36 of the Complaint on the grounds that Defendants do not have actual knowledge of Plaintiffs' beliefs.

37. Defendants deny the allegations contained in Paragraph 37 of the Complaint.

38. Defendants deny the allegations contained in Paragraph 38 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

39. For their answer to Paragraph 39 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

40. Defendants deny the allegations contained in Paragraph 40 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

41. For their answer to Paragraph 41 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

42. Defendants deny the allegations contained in Paragraph 42 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

43. For their answer to Paragraph 43 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

44. Defendants deny the allegations contained in Paragraph 44 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

45. For their answer to Paragraph 45 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

46. Defendants deny the allegations contained in Paragraph 46 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without

knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

47. For their answer to Paragraph 47 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

48. Defendants deny the allegations contained in Paragraph 48 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

49. For their answer to Paragraph 49 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

50. Defendants deny the allegations contained in Paragraph 50 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity

and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

51. For their answer to Paragraph 51 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

52. Defendants deny the allegations contained in Paragraph 52 of the Complaint. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

53. For their answer to Paragraph 53 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

54. Defendants deny the allegations contained in Paragraph 54 of the Complaint. Defendants allege that the

Equal Access Act is unconstitutional because it violates the Establishment Clause, is unconstitutionally vague and is unconstitutional as applied to the facts of this case. Defendants further allege that Westside High School does not have a limited open forum under the Equal Access Act; that there has been no discrimination on the basis of religious, political, philosophical or other content of speech; and that all student groups and organizations at Westside High School are related to the curriculum of Westside High School. Defendants allege that any and all acts of Defendants were performed in their official or representative capacity and not in their individual capacity, were performed in good faith, and without knowledge that any such acts were in violation of any constitutional or statutory rights of Plaintiffs.

55. For their answer to Paragraph 55 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

56. Defendants deny the allegations contained in Paragraph 56 of the Complaint.

57. For their answer to Paragraph 57 of the Complaint, Defendants incorporate by reference the allegations contained in Paragraphs 1 through 30 of this Answer.

58. Defendants deny the allegations contained in Paragraph 58 of the Complaint.

59. Defendants deny the allegations contained in Paragraph 59 of the Complaint. Defendants allege that Plaintiffs are not subject to immediate and irreparable injury if injunctive relief is not granted.

60. Defendants deny the allegations contained in Paragraph 60 of the Complaint.

WHEREFORE, Defendants, and each of them request that Plaintiffs' Complaint be dismissed and that Defendants be awarded attorney fees and costs pursuant to 42 U.S.C. 1988.

[Defendants]

By:/s/Allen E. Daubman

* * *

(Certificate of Service omitted in printing)

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, et al.,	)	
Plaintiffs,	)	CV 85-0-426
vs.	)	**ORDER ON FINAL PRETRIAL CONFERENCE**
UNITED STATES OF AMERICA,	)	
Intervenor-Plaintiff,	)	
vs.	)	
THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,	)	
Defendants.	)	

A final pretrial conference was held on the 26th day of November, 1986. Appearing for the parties as counsel were:

Douglas Veith
PELTON, BERTOLINI, SCHROEDER,
VEITH & O'NEAL
205 Galvin Road North
Bellevue, NE 68005
(402) 292-2800
Attorney for Plaintiffs

(Also appearing is The National Legal Foundation as Co-Counsel for Plaintiffs)

Allen E. Daubman and Verne Moore, Jr.
MCGILL, KOLEY, PARSONAGE AND LANPHIER, P.C.
10010 Regency Circle
Omaha, NE 68114
(402) 397-9988
Attorneys for Defendants

Douglas Semisch
ASSISTANT UNITED STATES ATTORNEY
P. O. Box 1228, DTS
Omaha, NE 68101
(402) 221-4774
Attorney for Intervenor-Plaintiff

A. Exhibits in Evidence. The following exhibits are received into evidence without objection and no formal offer need be made of them:

Plaintiffs' Exhibits No. 1-53, 56-63, 71, 72, 73

Intervenor-Plaintiffs' Exhibits No. None

Defendants' Exhibits No. None

B. Foundation for Exhibits. Foundation for the following exhibits has been stipulated or waived:

All exhibits except 58, 64-70.

C. Uncontroverted Facts. The parties have agreed that the following may be accepted as facts for purposes of this case only:

1) That all Plaintiffs are citizens of Omaha, Nebraska and are or were students at Westside High School, which is a school within the Westside Community Schools, known as District 66.

2) That Westside High School is a secondary school as defined by Nebraska State Law and as defined by the Equal Access Act.

3) That the Westside Community Schools (District 66), is an independent school district, organized and existing under the Constitution and Laws of the State of Nebraska, and is managed, governed and controlled by the Board of Education of the Westside Community Schools.

4) That at the time of the filing of this action Defendant Wayne W. Meier was a resident of Douglas County, Nebraska, and the President of the Board of Education of the Westside Community Schools, District 66.

5) That Defendant, James E. Findley, is a resident of Douglas County, Nebraska and is the Principal of Westside High School.

6) That Defendant, James A. Tangdall, is a resident of Douglas County, Nebraska and is the Associate Superintendent of Schools for Westside Community Schools, District 66.

7) That Defendant Kenneth K. Hansen is a resident of Douglas County, Nebraska and is the Superintendent of Schools for Westside Community Schools, District 66.

8) That jurisdiction is admitted and venue is proper in this Court.

9) That at the time of the filing of this action, Plaintiffs Bridget C. Mergens, Stephen P. Hollar, Andrea Simmonds and David K. Harris were seniors at Westside High School. These four Plaintiffs have subsequently graduated, graduating in June of 1985.

10) That Plaintiff Brian P. Rensing is a senior currently enrolled at Westside High School.

11) That Plaintiffs Michelle M. Harris, Kendra K. Kellison and Kevin Brown are juniors, currently enrolled at Westside High School.

12) That Westside High School received Federal financial assistance for the year ending August 31, 1985 as set forth in Exhibit 73, said Federal financial assistance being paid through the State of Nebraska to District 66 and then distributed as required to the individual schools within District 66, including Westside High School. Westside High School continues to receive Federal financial assistance through the State of Nebraska, said assistance being directed to District 66 and then distributed as required.

13) That in January 1985, Plaintiff Bridgett (sic) C. Mergens met with Defendant James E. Findley and requested permission to form a Christian Club at Westside High School. The club proposed by Bridget Mergens at Westside High School was requested to be idential (sic) in its formation, rights, privileges, terms and conditions as other Westside High School affiliated student clubs, but the Christian Club would not have a faculty sponsor. That Defendant Findley denied the request to form such a Christian Club.

14) That in February 1985, Plaintiff Bridgett (sic) C. Mergens met with Defendant James E. Findley and Defendant James A. Tangdall who informed Plaintiff Mergens that they had discussed the request to form the Christian Club at Westside High School with Defendant Kenneth K. Hansen and that Defendants Findley, Tangdall and Hansen had all agreed that the request should be denied.

15) That on March 4, 1986, Plaintiff Mergens petitioned Defendant Board of Education for permission for the proposed Christian Club to meet at Westside High School. As explained to the Board, by Plaintiff Mergens, the Christian Club would not have a faculty sponsor except as required by School Board policy for custodial purposes. If required, a faculty sponsor would attend in a nonparticipatory capacity only. The Board of Education voted to uphold the denial of Defendants Findley, Tangdall and Hansen for Plaintiff Mergens to form such a club.

16) Westside High School has approximately 30 clubs that meet at Westside High School after school. These clubs generally meet after normal school hours in the Westside High School buildings, and all have faculty sponsors.

17) Plaintiffs and Defendants have agreed that the following ten clubs are ones which Plaintiffs claim are noncurriculum for purposes of the Equal Access Act and Plaintiffs' constitutional claim of right of access to school premises for the Christian Club. By doing so Plaintiffs are not admitting that the remaining clubs are curriculum related as envisioned by the Equal Access Act:

Interact	Welcome to Westside
Chess	Future Business Leaders of America
Subserfers (sic)	Zonta
National Honor Society	Student Advisory Board
Photography	Student Forum

18) That there are no space limitations or time and place restrictions which would prevent Plaintiffs' proposed Christian club from meeting at Westside High School.

D. Controverted and Unresolved Issues. The issues remaining to be determined and unresolved matters for the courts (sic) attention are:

1) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School, violates Plaintiffs' free speech rights under the First Amendment to the United States Constitution.

2) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School, violates Plaintiffs' rights of association and assembly under the First Amendment to the United States Constitution.

3) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School, violates Plaintiffs' free exercise rights under the First Amendment to the United States Constitution and fails to give reasonable accommodation to the Plaintiffs' religious beliefs.

4) Whether the denial by Defendants of Plaintiff's (sic) request to form the Christian Club at Westside High School, in fact violates the prohibition of the Establishment Clause of the First Amendment to the Constitution of the United States against State hostility towards religion.

5) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School violates the Plaintiffs' right to equal protection of the law under the Fourteenth Amendment to the Constitution of the United States of America by discriminating

against the Plaintiffs based solely on the fact that Plaintiffs wish to engage in religious speech.

6) Whether Defendant School Board policy No. 5610 violates the due process clause and equal protection clause of the Fourteenth Amendment to the Constitution of the United States of America in that it is unconstitutionally vague and is unconstitutional as applied to the facts in this case.

7) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School violates Plaintiffs' constitutional rights under the First and Fourteenth Amendments of the United States Constitution thereby also violating 42 U.S.C. § 1983.

8) Whether the denial by Defendants of Plaintiffs' request to form the Christian club at Westside High School constitutes a violation of the Equal Protection Rights Provision of the Nebraska Constitution, Article I, Section 1.

9) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School is a violation by Defendants of Plaintiffs' right to religious freedom under the Nebraska Constitution, Article I, Section 4.

10) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School violates the Equal Access Act, 20 U.S.C. § 4071-4074.

11) Whether the Equal Access Act, 20 U.S.C. § 4071-4074 is unconstitutional.

12) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School is a direct violation of Defendant School Board's Policy 5450. (Short Description)

13) Whether the denial by Defendants of Plaintiffs' request to form the Christian Club at Westside High School is a direct violation of Defendant School Board's Policy 6180.

14) The nature of the forum existing at Westside High School at the time and after Bridget Mergens made her request to form the Christian Club.

E. Witnesses. All witnesses whom the Plaintiffs expect to testify, except those who may be called for impeachment purposes only are:

1. Roxanne Abbot*
2. Anne Breitinger*
3. Sandy Carbaugh*
4. Keven Coates*
5. Davis Harris*
6. Michelle Harris*
7. Lisa Healy*

8. Jennifer Hilt*
9. Rick Hustig*
10. Kendra Kellison
11. Jeff Ramsell*
12. Brian Rensing*
12. (sic) Derek Stoneburg*
13. Kevin Brown*
14. Bridget Mergens*
15. Chris Polen*
16. Steven Hollar*
17. Andrea Simmonds*
18. Wayne W. Meier*
19. James E. Findley*
20. James A. Tangdall*
21. Kenneth K. Hansen*
22. Ron F. Huston*
23. Sandy Skar*
24. Grey Taulborg*

All witnesses whom the defendant(s) expect to call to testify, except those listed in the preceding paragraph as expected to be called by the plaintiffs and except those who may be called for impeachment purposes only, are:

It is understood that, except upon a showing of good cause, no witness whose name and address does not appear herein shall be permitted to testify over objection for any purpose except impeachment.

F. Expert Witnesses' Qualifications. Experts to be called and their qualifications are:

1) Dr. Ward Sybouts*
Dr. Sybouts is an expert in the field of curriculum development with specialization in School Activities.

2) Dr. Joseph C. LaVoie*
Dr. LaVoie is a developmental psychologist at the University of Nebraska, Omaha Campus.

3) Dr. David S. Moshman*
Dr. Moshman is a developmental psychologist at the University of Nebraska, Lincoln Campus.

G. Depositions and other Discovery Documents.
(1) Depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the plaintiff as part of plaintiffs' case-in-chief are:

Complete Deposition of Steven Hollar.

Defendants' answers to Plaintiffs' Interrogatories #1, #2, #3, #6, #7, #8, #9, #10, #11, #12, #14, #17, #23, #24, #27, #28.

Objections by the defendant are: #28 - Relevancy.

(2) All depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the defendant as part of the defendants' case-in-chief are: None

Objections by the plaintiff are: None.

H. Length of Trial. Counsel estimates the trial will consume not less than 3 days, not more than 6 days, and

probably about 5 days. The case shall be in readiness for trial after March 31, 1987.

Proposed Findings shall be filed by each side and trial briefs shall be submitted by each side no later than March 31, 1987.

Accepted by the parties the 26th day of November, 1986.

(Names of parties and attorneys omitted in printing)

Approved by the Court his 26th day of November, 1986.

/s/ Richard C. Peck
U. S. Magistrate

(Attachments A, B and C - vitae of Ward Sybouts, Joseph C. LaVoie, and David Moshman - omitted in printing)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BRIDGET C. MERGENS, et al.,	)	CV 85-0-426
Plaintiffs,	)	
vs.	)	**ORDER IN SUPPLEMENTATION OF PRETRIAL ORDER**
UNITED STATES OF AMERICA,	)	
Intervenor-Plaintiff,	)	
vs.	)	
THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,	)	
Defendants.	)	

In confirmation of rulings made at pretrial conference held on November 26, 1986,

IT IS ORDERED:

1. Defendants' objection to inclusion in the pretrial order listing by plaintiffs of ten students to be called as

trial witnesses, who only within the past week had been disclosed to defendants' counsel, is denied.

2. Plaintiffs' motion (filing 102) for leave to designate out of time expert witnesses therein identified is granted.

3. Within ten (10) days from date of this order, plaintiffs shall supplement their answers to interrogatories by defendants setting forth the nature of the testimony sought to be adduced from the ten students and F.R.Cv.P. 26(b)(4)(A)(i) information as to the testimony of the now designated expert witnesses.

4. Defendants are granted leave to designate expert witnesses and to supplement identification of fact witnesses after deposing those fact and expert witnesses which plaintiffs have now been given permission to call.

5. The time within which further deposition discovery shall be accomplished is extended to March 14, 1987.

6. Any amendments required to the pretrial order as may be required by reason of the additional discovery allowed

as provided above shall be filed no later than March 31, 1987; and the case shall be subject to call for trial anytime after that date.

DATED this 26th day of November, 1986.

BY THE COURT,

/s/Richard C. Peck
Richard C. Peck
United States
Magistrate

[12] BRIDGET COLLEEN MERGENS, called as a witness on her own behalf, being first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. VEITH:

[13] Q. Are you the lead plaintiff in this particular case?
A. Yes, I am.

Q. Miss Mergens, in 1985, January of 1985 -- I want to take you back to that time period -- where were you located at that time?
A. I was a student at Westside High School and I lived on 89th and Pacific in Omaha.

Q. And you lived there with your family?
A. Uh-huh.

Q. Did you have a church affiliation or religious affiliation in January of 1985?
A. More or less, yes, I did.

Q. Where were you attending church?
A. Most of the time I was attending Glad Tidings Assembly of God.

Q. As you recall, in January of 1985, what occurred in reference to the facts of this particular case?
A. A friend of mine, Andrea and I, decided that we would like to start a Fellowship Club at Westside and so on a very informal basis I confronted Dr. Findley on that.

Q. When you say "Andrea," is that Miss Simmonds?
A. Yes.

Q. And she is also a plaintiff in this case?

[14] A. Yes, she is.

Q. Okay. When you contacted Dr. Findley, how did you describe the club to him that you wanted to form?
A. I was very uninformed at that time and I simply stated that I would just like to start a -- some sort of a gathering of students who were -- had similar beliefs in God and would like to get together in the morning or after school for fellowship and prayer.

Q. Did you express that desire to Dr. Findley?
A. Yes, I did, sir.

Q. And what did he say to you?
A. He said, to the best of my knowledge, that it was a very good idea but that sort of a club would not be allowed in the school.

Q. Did he give you a reason for why the club would not have been allowed?
A. He said that -- that it did not go exactly with the school system and what the school's beliefs were on that sort of a club.

Q. Back then if Dr. Findley had told you that he would allow you to have a club if you allowed him to post a

disclaimer of the club, would you have gone ahead and formed your club under those conditions?
A. Yes, sir.

MR. DAUBMAN: Objection, speculation, Your Honor.

[15] THE COURT: Overruled. You may answer.

A. Yes.

Q. Would it have been okay with you if Dr. Findley had told you that he would also want to make some sort of an announcement, either in the school newspaper or through the public address system, that the school did not support that particular club? Would that have been okay with you?
A. That would have been fine with me, sir.

Q. Did Dr. Findley suggest any of these two alternatives to you?
A. No, sir.

Q. He just denied your request and stated that it didn't go along with school policy?
A. Yes.

Q. Miss Mergens, would you have allowed anyone to become a member of this particular club?
A. Yes.

Q. Would it have been non-denominational?
A. Yes.

Q. Would you have allowed individuals from other faiths to attend?
A. Yes.

Q. Would there have been any kind of required attendance?
A. Oh, no.

Q. Did any church, pastor or outside group direct you to [16] form or to try to form a Bible Study Club at Westside High School?
A. No, sir.

Q. Who did you envision being members of the particular club?
A. Any students who were interested who wanted to attend. There would be no rigid policy, just anybody.

Q. When you say "any students," you meant Westside High School students?
A. Any Westside High School students.

Q. And did you express that to Dr. Findley, that it would be any Westside High School students?
A. Yes, I did.

Q. Was such a club already in existence in January of 1985 when you first contacted Dr. Findley?
A. No, sir.

Q. Why did you ask permission from him to form the club?
A. He was my home room teacher and he was also the principal of the school so I knew him and I believed that he would be the one -- he would be the first one to contact, to be the first one to confront on a situation like that.

Q. So you were in his home room class?
A. Yes, I was.

Q. And you saw him on a daily basis?
A. Yes.

[17] Q. Why did you feel that you needed to have such a club at Westside High School?
A. I -- I'm a Christian and I believe that every single day of my life is part of my Christian experience and I don't -- I don't leave my Christianity to a certain day of the week like Sunday. I don't leave it at church. It's a day-to-day basis and it's something that I need encouragement in daily.

Q. Are you still a Christian today?
A. Yes, I am.

Q. Do you still attend the same church that you did in January, 1985?
A. No, I don't.

Q. Do you now meet with other Christians on a regular basis in a group?
A. Yes, I do.

Q. What do you do when you meet in the group?
A. Well, we pray and we read the Bible and we talk about things that are going on in our lives and how we can help each other and give advice and give encouragement to one another.

Q. When did this group that you are now a member of first being to meet?
A. A fellowship group type group that I started at the end of March of 1985.

Q. This was after the School Board had --

[18] A. Yes, it was.

Q. Do parents direct or lead the group that you are leading now?
A. No. No.

Q. Do they have anything to do with the group at all?
A. Other than allowing the use of their house, no.

Q. Does your pastor direct or lead this group?
A. No.

Q. Is this the same -- the group that you attend now, is this the same group basically that was started in late March of 1985?
A. It's the same format but very many different people.

Q. Do you have a name or anything for this belief that you need to gather together and share ideas and encourage one another?
A. I consider it fellowship.

Q. And is that something that you find that is a requirement of your Christian experience?
A. Yes, I do.

Q. Now, back to Dr. Findley. At the time that you discussed the formation of the group with Dr. Findley in early 1985, when you said that Miss Simmonds and you discussed this with him or at least you had talked about forming a group, [19]

were there other students besides yourself and Miss Simmonds who wanted to have a group such as you were proposing?
A. Yes, there were. That's why -- that's what gave us the idea to start a group, because there was more than just the two of us. There were many other students.

Q. Approximately how many students were there?
A. Approximately 25, 20 to 25.

Q. How well did you know most of those students?
A. I knew probably half of them very well and the other half I had known through meeting them once or twice or word of mouth.

Q. Did any of them attend your church?
A. At the time, David Harris attended Glad Tidings and so did his sister, Michelle.

Q. But the other 25 or so that you mentioned, they did not attend your church?
A. No, they did not.

Q. Other than David Harris and Michelle Harris, had you ever prayed or attended any religious services with any of these students?
A. Miss Simmonds and I attended a Christian concert together and various other groups with various other kids, I met with them and went to various other things, like youth groups and things like that.

Q. It was nothing organized out of one particular church [20] or anything like that?
A. Oh, no.

Q. When you met with Dr. Findley in early 1985, the first meeting, was that a formal meeting in his office or was that kind of an informal meeting?
A. No. I went in there on a free "mod" and just asked him very casually if -- what he thought of the idea of having a Bible Study Group.

* * *

[21] Q. And when you went to see Dr. Findley the first time, in January of 1985, did you go alone?
A. Yes, I did.

Q. And that's when you discussed the club with him, is that correct?
A. Yes.

Q. Where did you envision this club meeting?
A. Any empty classroom in the morning or after school.

Q. Did you want any special time other than when the other clubs met?
A. No.

Q. Why did you want to meet in the school?
A. We felt it was our right, for one, and we also felt that it would be a lot more convenient for the kids involved.

Q. At the time that you met with Dr. Findley, the first [22] time, had you ever heard of the Equal Access Act?
A. I heard Andrea mention -- Andrea Simmons mention something about it but I don't remember the title ever being used.

Q. How did you then find out more about the Equal Access Act?
A. A friend of mine, Danny Borman (phonetic), told me that that was the name of the Act and I then contacted Mr. Veith and also called -- or a friend of mine called Congressman Daub's office to get a copy of the act so that I could see it for myself.

Q. Was this after your first meeting with Dr. Findley, though?
A. I don't know if all of this took place after our first meeting. I know that that was how I found out about the Equal Access Act.

Q. At the time of -- I guess what I am asking is at the time of your first request of Dr. Findley to form the group, you didn't know me, did you?
A. No.

Q. You came to me afterwards, correct?
A. That's correct.

Q. And when you are talking about "Mr. Veith," you are talking about me?
A. Yes.

* * *

[23] Q. Did you have a subsequent meeting with Dr. Findley or Dr. Tangdall?
A. Yes, I did.

Q. And approximately how long after your first meeting with Dr. Findley did this occur?
A. Probably about a week afterwards. I had found out a little bit about the Equal Access Act and a friend of mine from choir, her name was Gray Taulborg, together we went and discussed it again with Dr. Findley.

Q. And what happened at that particular meeting?
A. We were again denied access.

Q. Did you discuss anything different with Dr. Findley at the second meeting as to what you were hoping to accomplish through the formation of the club?
A. No.

[24] Q. Did you express it any differently to him, that you recall?
A. No, I didn't express it any differently.

Q. What basically was your request? What were you really looking for when you went to see Dr. Findley on those two occasions?
A. I simply wanted to be able to start a group, just not even start an official group, but just have a group of kids that were allowed to meet in the school, on the -- on the campus in non-instructional time and

be able to get together with Christian friends and just have fellowship.

Q. Is that what you said to Dr. Findley?
A. Yes.

Q. And on the second meeting what did he say to you?
A. I believe he contacted other members of the administration by that time and done a little more checking on the Equal Access Act and he said -- he just simply said it would not be allowed and he was sorry.

Q. Did he tell you why it wouldn't be allowed, though?
A. He said that it wouldn't -- it wouldn't comply with the school's policy of allowing religion in school.

Q. Did he mention at all to you the separation of church and state?
A. No. Dr. Findley did not.

Q. But he said it wouldn't be allowed because of religion [25] in the school?
A. Yes.

Q. At that meeting with Dr. Findley, the second one, or even the first one, did he ever suggest to you an alternative meeting place?
A. I believe the second time he -- he suggested, "Have you ever thought about going to the church next door?"

Q. And what was your response to that?
A. I said, "No," I hadn't thought about it and I didn't believe that we would have to go to the church, I believed that we should be able to meet in the school.

Q. So you weren't looking to be treated any differently --
A. No.

Q. -- is that what you are saying?
A. We didn't want to be set apart.

Q. Do you know the name of the church that he is talking about?
A. Yes. It's Countryside Community Church.

Q. And do you know the name of the pastor of the church?
A. No, I don't.

Q. Have you ever met him?
A. No.

Q. Did you ever attend church there?
A. I had a piano recital there once when I was a little kid. That's all I remember about the church.

[26] Q. You are not a member of that church then?
A. No.

Q. To your knowledge, were any of the young people, the 25 or so that were interested in forming the club at Westside High School -- to your knowledge, were any of them members of that church?
A. No, not to my knowledge.

Q. Do you know if the church is the same denomination as yours?
A. No, it's not.

Q. Do you have any contacts at all with that particular church?
A. No.

Q. And when you made your request to Dr. Findley for forming the club, you were merely looking for a place to meet within the school, is that correct?
A. Yes, I was.

Q. What about the use of bulletin boards? Would you have wanted to use the bulletin boards?
A. At that time, that wasn't at all on my mind. I simply wanted a place to meet. It wasn't something that had come into question because we weren't allowed to meet, so we didn't think about those things.

Q. What about the use of the intercom system or even the school newspaper to set forth the club, its meeting time, [27] and place?
A. Up until today I didn't know Westside really had a P. A. system because I don't remember it ever being used when I was a student there, and as far as the newspaper, that never came to my mind either.

Q. What about teacher sponsorship? Did you request teacher sponsorship of this particular group?
A. No, I did not.

Q. Had anybody ever indicated to you that they might be willing to sponsor the group?
A. There were teachers, after I found out more about the Act, where it said that a teacher must be present at all meetings -- there were teachers who said they would be willing to be present, just to monitor, just to make sure that nothing went wrong in the school.

Q. Did you tell Dr. Findley about some of those possible teachers at any time?
A. No, I don't remember telling him.

Q. And you don't know if he talked to any of the sponsors, do you?
A. Any of the--?

Q. Any of the potential sponsors of the club, do you know if he talked to any of them?
A. I don't -- I don't know. I didn't ask him.

Q. Why didn't you ask for a faculty sponsor, [28] Miss Mergens?
A. I didn't feel like it was necessary. We -- we didn't want to have a -- a big deal. We just wanted to have a simple gathering place, just a place to meet. It wasn't anything extensive that we had in mind.

Q. Did you want the group to be during non-instructional time, is that correct?
A. Yes, I did.

Q. And you also wanted it to be, again, non-denominational correct?

A. Yes.

Q. So did it really matter to you whether a teacher sponsor was present during the meeting time with your group?
A. No.

Q. You hadn't really considered that?
A. No.

Q. If the school had required a teacher sponsor, if Dr. Findley had said to you, "You can meet but you have to have a teacher sponsor present for that particular club," would that have been okay with you?
A. Yes.

Q. You wouldn't object to that?
A. Yes. I would have been very willing to oblige whatever the school policy was.

Q. Did you ever have an opportunity after your meetings [29] with Dr. Findley to discuss the Fellowship Club that you were proposing with Dr. Tangdall?
A. Yes, I did.

Q. About how long after your second meeting with Dr. Findley did that take place?
A. Probably three to four days, somewhere in that time frame. I was called out of home room to come upstairs to the -- to the office, the main office, and I found Dr. Tangdall there and he mentioned to me that he had heard what was -- what I had requested and he explained to me clearly how he felt

about letting in a group like that in the school and he stated that it would -- because of separation of church and state that we would not be allowed to meet on the campus.

Q. You said he discussed why. Is that all that he really talked about, was the separation of church and state or did he give you any other reasons?
A. Yes. That is what stood out in my mind, is he stated it was not being -- it would not be in accordance with the separation of church and state.

Q. And that is clear to you as the reason that he gave for denying the club?
A. Yes.

Q. Did he indicate to you whether that was his opinion or the opinion that he had received from someone else?
A. He -- he stated with the authority that it was the [30] school, it was the school's opinion.

* * *

Q. Jumping back to Dr. Findley the first time that you spoke to Dr. Findley about the club in January of 1985, he gave you a response right away, didn't he?
A. Yes, the first time.

Q. He denied you the club the first time?
A. Yes.

Q. And then you had a second meeting about a week later. Did he at that second meeting give you any indication that he had received legal counsel concerning the club?
A. No.

Q. That he had sought any other advice from an attorney?
A. No, sir.

Q. Or from legal counsel for the school?
A. No.

Q. Did Dr. Findley or Dr. Tangdall ever inform you of your right to appeal their decision to the School Board?
A. Yes, I believe they did. I asked them how -- would there be any way that I could check out any further the possibility of us meeting in the school and they said that the next level was the School Board.

* * *

[31] Q. After your last meeting with Dr. Tangdall and Dr. Findley, what happened next?
A. We prepared to go to the School Board after that time.

Q. Did you in fact then go to the School Board?
A. Yes, we did.

Q. And did you present a request at the School Board to be able to form the Fellowship Club that you had been speaking of?
A. Yes.

* * *

[32] Q. And do you recall what the decision of the School Board was?
A. They again upheld the decision and denied us access.

Q. This was in March of 1985?
A. It was March 4th, I believe.

* * *

Q. You stated that after the denial in March, finally, [33] of the School Board that you became involved in a group. Did this group meet outside of Westside High School?
A. Yes, sir.

Q. And where did it meet?
A. It met ~~at my~~ house.

Q. Who made up the group? What sort of individuals attended that group?
A. Students -- students from all over, different schools. There were some students from Benson and some students from Westside and students from UNO, even.

Q. Where did this particular group meet?
A. It met at my house.

Q. And when did it meet?
A. At 7:00 o'clock on Tuesday night.

Q. What was the purpose of that particular group?
A. The same purpose, to have fellowship.

Q. And did it always meet at your house?
A. Not through the entirety of the -- of the life of the club or the life of the group or whatever. It met for three months at my house and then it moved to Andrea Simmonds' house.

Q. Is the group still going on today?
A. Yes.

Q. That's the one that you talk about --
A. Yes.

[34] Q. -- that you still are a member of?
A. Yes.

Q. Did the same people who had expressed an interest in the club at school, the Westside students that wanted to form the club, did they also participate in this group at your home?
A. No. Many of them couldn't come because of work schedules and other extra-curricular activities. They couldn't make it.

Q. Had the group been permitted to meet at school, would they have been able to come to that meeting at school?
A. The Westside High School students would have but not the other students that weren't Westside High School students.

Q. And you weren't intending to bring other students from the outside into the Westside High School group, were you?

A. No.

Q. Miss Mergens, do you know for a fact whether other students in the Omaha area meet at schools in groups similar to what you are proposing?
A. Yes, sir. Many different schools.

Q. What are some of the schools where these groups meet?

* * *

[35] A. Papillion High School, Bellevue East and Bellevue West, Burke. Central had a group. I don't know if they still do. And Benson had a group.

Q. Did these groups meet in the school?
A. Yes, sir.

Q. After school?
A. Before or after school.

* * *

Q. Let's take a look at Choir. What did you have to do to be a member of the Choir Club?
A. You had to be a student in Choir. If you weren't -- and you were also required to attend various performances and if at all possible you were required to go on tour, which is at the end of April, and if you couldn't attend all those things, then your grade was docked a little bit in Choir.

Q. So there was a Choir class, an actual core class, that you got a grade in?

A. Yes, sir.

Q. And then there was a Choir club, as you understand it, [36] also?
A. I -- I understand it to be a club because it was represented on Club Fair Day.

Q. And so did you meet after school in this Choir Club and practice, go to recitals and the like?
A. Non-instructional time. We usually had concerts three or four times a year -- on Tuesday nights at 8:00.

Q. And if you did not attend these concerts or a certain number of them, did that affect your grade?
A. Yes, sir.

Q. It would give you a lower grade?
A. Yes. He was very strict on attendance at the performance.

Q. And when you say "he," who was that?
A. Mr. Schuler (phonetic).

* * *

Q. You also said that you were in Drama, is that correct?

[37] A. Yes, sir.

Q. Now, was there a requirement to attend Drama Club?
A. No, sir. It was totally whoever wanted to come or was willing to come were allowed to come.

Q. Did you get a higher grade in any of the dramatics types of classes because you were a member of Drama Club?
A. No.

Q. Was there any required attendance at Drama Club?
A. No.

Q. No attendance taken there at Drama Club?
A. No. If there was any attendance taken, it was taken by us. I was an officer in Drama Club my senior year and we pretty much made the different decisions on who was there and if they weren't there and what they were going to do for candy sales and how to get them the candy and all that sort of thing, and that was basically how we arranged that.

* * *

Q. Did that particular club have a sponsor?
A. Yes, sir. It was --

Q. What was the sponsor's name?

[38] A. Larry Fortney.

Q. And did he attend all of the club meetings and the like?
A. No, sir. He had a daughter who was in a car pool who he always had to go and get and sometimes he would come back and lock up after we were done.

Q. So he just kind of left you there to do your thing in Drama Club?

A. Yeah. We, as the student leaders, led the groups, organized them unless Mr. Fortney had an announcement to make or anything along those lines.

Q. What sort of things did you do in Drama Club?
A. Most of what the club was was a party club. They would have parties on different holidays and the only thing formal that we did was one of the junior high or elementary schools had asked us to do Parent-Teacher Day and Student Day, Family Day, at Swanson Elementary for Christmas where we would perform some skits, and not all the members of Drama Club did that. Just a few.

Q. Did you actually take a course in high school known as Drama where you got a grade?
A. Yes, I took that the first semester of my junior year, I believe.

Q. And then you were in Drama Club your senior year?
A. The end of my sophomore year, the second semester [39] of my sophomore year, my whole junior year, and my whole senior year.

Q. In fact, was there any similarity, Miss Mergens, between Drama Club and the Drama class that you were in?
A. No.

Q. Were there any people in Drama class that were not in Drama Club?
A. Yes.

Q. Were there people --
A. Quite a few.

Q. Quite a few?
A. Yes. There was probably a class, one class or two Drama classes of 20, and Drama Club had about 80 people in it.

Q. Were the [sic] any people in Drama Club that were not in Drama class?
A. Yes.

Q. And were you one of those your senior year?
A. I wasn't in a Drama class my senior year at all.

Q. But you were still in Drama Club?
A. Yes.

Q. How often did the Club meet, Miss Mergens?
A. About once every three to four weeks.

Q. And were you required to actively participate in whatever the Club did?
[40] A. No. It was free. If the students wanted to participate in the various activities, they were allowed to, and if not, if they didn't want to, they didn't have to.

* * *

Q. While you were at Westside High School during those three years, do you ever recall being in classroom situations which required attendance where controversial subjects were addressed?

A. Yes, sir.

Q. What are some of the controversial subjects that were brought out in the classroom?

* * *

A. Particularly in Sociology my senior year we talked about abortion and family planning and just various child cases or various child -- things like adoption and such, and in History my junior year, Advanced Placement History, we talked about anything from drugs and sports to -- (laughing) [41] anything. We talked about everything in that class. Whenever there was a controversial subject on television, it was brought up in class by the teacher.

Q. Were you free in these two classes to exchange your ideas and your opinions on these controversial subjects?
A. Yes.

Q. Do you ever recall any outside speakers being brought in to discuss these controversial subjects?
A. In Sociology my senior year, Planned Parenthood was at the school for a whole day and you were required to attend one -- one module, "mod," for the entire 40 minutes for a presentation from them.

Q. Did you attend that that year?
A. Yes, sir.

Q. And what went on in that module?
A. They explained various forms and devices of birth control and they showed everybody everything and discussed the best forms of birth control and the lease effective and things like that.

Q. Were these explained to you in a way that you then had the decision to weigh whether or not you wanted to use any of these birth control methods or not?
A. Yes, sir.

Q. Do you know why they were allowed to come in to the school?

[42] A. We were on a marriage unit and we were discussing -- you had to take a quiz on all these forms of birth control. You had to pick one form and you had to take a quiz on it and if you failed the quiz, you and your marriage partner in that class were pregnant and you had to arrange for a child in your family and budget, and that was what the family unit was on in Sociology.

Q. Was every student at Westside High School required to attend one of these modules when Planned Parenthood came to the school?
A. No, sir, only the students in Sociology.

* * *

Q. Miss Mergens, in these time periods where controversial subjects were discussed, do you ever recall a particular teacher taking a stand on one side or the other?
A. Yes. In -- I don't remember in Sociology any of the teachers taking a stand, but in A.P. History, the two A.P. teachers would take a stand on anything that you wouldn't take a stand on, they'd take the other side and they'd -- I [43] don't know if it was for the sake of argument or for just the sake of what they really believed.

Q. They didn't express why they were taking the other side, but they would always take the other side then you?
A. Sometimes they would. Sometimes they would take your side as long as there was somebody to argue against.

Q. What kind of subjects in A.P. History? The ones that you named off before? Drugs? Sports?

A. We talked about church and state issues. We talked about issues dealing with just various cases. We would touch on cases once in a while, like the one with the black arm bands in Vietnam protesting. We talked about that, and I wish I could remember all the things we talked about -- just anything daily, you know, daily in the paper.

* * *

CROSS EXAMINATION

BY MR. DAUBMAN:

* * *

Q. Miss Mergens, let me first touch on some of these controversial subjects that occurred in the A.P. History, for example. When the controversial subjects were discussed, was [44] a teacher always present?

A. Yes, sir.

Q. Was it brought up in the context of what was being done in that particular course that day, in connection with the class and curriculum as opposed to an outside activity?

A. It was presented -- the class was a discussion class and it was presented as a topic for discussion. Sometimes we wouldn't even get to our real discussion that we were having for the day, but he did give -- I remember in particular my second semester teacher -- did give credit for who would get involved in the discussions, simply for the sake of discussion grades.

Q. The greater the participation, the better the grade?

A. Right.

Q. You say, "A.P. History." That stands for Advanced Placement History, is that correct?

A. Yes, sir.

Q. Is it your understanding that students placed in Advanced Placement History are the more advanced students in terms of higher academic performance at the high school?

A. It was a choice by the student made, whether they wanted to be a part of A.P. History or A.P. anything, Advanced anything. It was up to the student to decide. There was counsel given by college counselors and their own personal counselors.

* * *

[45] Q. In connection with the Planned Parenthood "mod" that you attended and the other things that were going on with the birth control discussions and so forth, was that in the context or in connection with the Sociology class?

A. Yes, sir.

Q. Was that under supervision of a faculty member at all times?

A. I don't -- I don't think that the faculty member was present at all times, especially during the lunch periods.

Q. When the Planned Parenthood people were talking?

A. Yes, sir.

Q. Okay. I am talking other than the times when the Planned Parenthood people were talking, when you were having these other activities in connection with your marriage unit

or family unit is Sociology, was that at all times conducted by a teacher --
A. Yes, sir.

Q. -- at Westside High School?
A. Yes, sir.

Q. That was present at all times?
A. Yes.

* * *

[46] Q. I wanted to get straight in my mind, Miss Mergens, exactly what went on at the high school from your perception when you were there with regard to the clubs, other clubs, at the high school. To your knowledge, did all of the other clubs at the high school have faculty sponsorship?
A. Yes, sir.

Q. To your knowledge, did all of the other student clubs at the high school use the school facilities?
A. Yes.

Q. And did those clubs meet at the school on a regular periodic basis?
A. Yes.

Q. Did those clubs have access to school bulletin boards to announce activities and meetings and so forth?
A. Yes.

Q. You also mentioned in your testimony something called a Club Fair, is that right?
A. Yes, sir.

Q. Could you explain to the Court what the Club Fair was when you were at the high school?
A. It was something that was in September usually for -- it was for the sophomores' benefit, brand new students in the school. It was for their benefit --

Q. Let me interrupt you there. This would have been [47] towards the very beginning of the school year?
A. Yes.

Q. All right, I'm sorry. Go ahead.
A. Approximately in September, and it was used as a way of -- of showing the clubs and showing what they do to students. It was -- it would go on all day long and students were free to go in and look around at the different displays that each club had, and that was only for sophomores who were really interested in finding out about a new club, and it was -- it was organized by students in the clubs who would be present during the whole day, whenever they were free they would take over and monitor the booth.

Q. Are club activities that are ongoing or that occur over the last year reported on occasion in the student newspaper at Westside High School?
A. The activities?

Q. Yes.
A. Advertisements for them or -- ?

Q. No. Just reports on an activity that the club did last week at the football game, something along those lines?
A. Yeah, I believe so.

Q. And were club activities over the year reported in the high school Year Book at Westside?
A. Yes, sir.

Q. When you first met with Dr. Findley, did you have a [48] club organized at that time?
A. No, sir.

Q. If I understand your testimony, you had a group of people who thought they might be interested if you could get something off the ground, basically?
A. Yes.

Q. Was the club that you were proposing to Dr. Findley to be a Christian Bible Study, Fellowship Club?
A. It would be centered around the Bible. It wouldn't be restrictive. It wouldn't be only open to people who were Christians. It would be open to anybody who considered themselves whatever, who considered themselves even an atheist or another religion or a Hindu or whatever.

* * *

[50] Q. How often did you intend to meet?

A. Intend? Probably once a week or whenever we would be allowed. I would preferably say once a week.

Q. So you envisioned your club would be meeting once a week?
A. Yes.

Q. Either before or after school?
A. Yes.

Q. In a classroom inside the school?
A. A classroom or an area or any place where we could be allowed.

Q. Is it true that you had requested of Dr. Findley and Dr. Tangdall and the Board of Education that you be allowed to form this club at Westside High School and that the club would be identical in its formation, rights, privileges, terms and conditions as other clubs at Westside High School except that it would not have a faculty sponsor?
A. It would -- if the school had desired for us to have [51] a faculty sponsor, if they required that, we were -- we were willing to go with that but at that time I didn't -- I didn't consider having a faculty sponsor because we weren't to the point of having an allowed club to meet.

Q. Was it your request of Dr. Findley and Dr. Tangdall and the Board of Education that your club be identical in its formation, rights, privileges, terms and conditions as the other clubs at the high school?
A. Yes, sir.

Q. Except that you would go either with a faculty sponsor or without a faculty sponsor, as the School District may choose?
A. Yes.

* * *

[52] Q. Were you requesting that your club be officially sanctioned and sponsored by the high school, that it be a high school club like the others?
A. It wouldn't have -- it wouldn't have to be a big deal where it was the Westside High School Bible Study Group. That wasn't our intent. Our intent was to start a group where we could meet, use the building. It was not -- we had not a chance to think that far ahead, because we weren't allowed.

Q. If it would have been acceptable -- or would it have been acceptable to you if the School District would allow your club to meet but would deny you the right or your club the right to use the bulletin boards to make announcements concerning the formation of your club and the meetings of your club?
A. Yes, sir, that would be fine.

Q. Would it have been acceptable to you if the school had denied or prohibited any coverage of your club in the Westside High School Year Book?
A. Yes.

Q. Would it have been acceptable if the school denied or prohibited any coverage of your club in the student [53] newspaper?
A. Yes.

Q. Would it have been acceptable to you if the school would deny your club from participating in the Club Fair?
A. Yes.

Q. If those requests had been made of the School District, would you view that as being a hostile reaction to your religious beliefs?
A. No, I don't believe it would be.

Q. Do you know of other Christians at Westside High School?
A. Yes, sir.

Q. And a number of these expressed some interest to you, either directly or through others, to be a part of this club if it were formed?
A. Yes, sir.

Q. Did you discuss religious topics at the high school with other students of yours at the time?
A. Co-students, yes, sir.

Q. Were you ever prohibited by any member of the administration or faculty of the high school or the staff from discussing religious matters with your students -- with your fellow students?
A. Not on an informal basis.

Q. I am excluding from my questions here the club that [54] you were requesting.

A. No, sir.

Q. Except for the club, were you ever denied the opportunity to discuss religious matters with your fellow students at the high school?

A. No.

Q. Other than possibly the denial of your request of the club, were you ever discriminated against, in your mind, by the administration or faculty or staff at the high school for your religious beliefs?

A. Not directly. I'm not saying by the administration because they were totally clean about discrimination. They weren't discriminating against me about my religious beliefs. Teachers who I was close to, mostly History and Political Science and Social Studies teachers, poked fun and jabbed and that was totally fine with me. It wasn't in an outward discrimination sense.

Q. Were you ever prevented, other than through the requested club, from exercising your religious beliefs by the administration of the school?

A. No.

Q. Were you ever prevented from exercising any of your rights of free speech except possibly the denial of the requested club?

A. Not other than the denial of the club. No.

[55] Q. Did Dr. Findley ever express to you any bias against religion that he had personally?

A. Not personally, he didn't.

Q. Did he ever express any bias against religion to you from the standpoint of the administration of the School District?

A. It wouldn't be a -- it wouldn't be a bias. It would be a -- it wouldn't be a direct bias, no.

Q. Did Dr. Tangdall ever express to you any bias against religion from a personal standpoint or from the standpoint of the school?

A. No, sir.

Q. Did Dr. Findley suggest to you that arrangements could possibly be made for your group to meet at the Community Church next door to Westside High School?

A. He suggested that I look into it but he never offered personally to go after that idea.

Q. If the School District through Dr. Findley or others had made arrangements for your group to meet either immediately before school or immediately after school at the West Side Community Church, would that have been acceptable to you and your group?

A. No, sir.

Q. Why would it not have been acceptable?

A. We didn't believe it was our right to have to be set [56] apart as a club. We wanted the same rights that other students had. I wanted the same rights that I had in my other clubs. I wanted the convenience that I had in my other clubs.

Q. Could you describe for the Court the location of the West Side Community Church in relation to the location of Westside High School?
A. It's across an access road that teachers use as parking and travel. It's across the access road from the guidance doors of the church.

Q. The guidance doors of the high school?
A. Of the high school, yes, sir. Thank you.

Q. Are the two buildings within a hundred feet of each other?
A. Yes, sir.

* * *

[58] Q. I will take you back to the meeting with the Board of Education. Was the Board of Education requested by you and Mr. Veith to allow your Christian Bible Study Fellowship Group to be a student club at Westside High School that would be the same as the other clubs at the high school except that it would not have a faculty sponsor?

* * *

A. We didn't restrict it to that. We were willing to have anything that the school wanted. We didn't require that it did not have a sponsor and we didn't require that it did have a sponsor. We were free to whatever the school system would require.

Q. Let me ask it then without the part relating to the faculty sponsorship. Was the request that was made by you and Mr. Veith of the Board of Education that you be allowed to have a Christian Bible Study Fellowship Club at Westside High School that was the same, and on the same terms and [59] conditions as the other student clubs at the high school?
A. Yes, sir.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

Q. Miss Mergens, looking at the sponsor, now you said you were in I believe Choir and Drama Clubs, is that correct?
A. Yes, sir.

Q. And Choir, the sponsor was who?
A. Mr. Schuler. Mr. Don Schuler.

Q. And did he attend all of the functions that you in Choir attended?
A. Yes, sir.

Q. He was there all the time?
A. Yes, sir.

Q. And he took attendance?
A. Yes.

Q. And he directed the Choir Club or the Warrior Voices or whatever?
A. Yes, sir.

Q. How about in the case of Drama Club? Did the Drama Club sponsor all of the functions of the Drama Club?
A. No, sir.

[60] Q. Did he direct the activities of Drama Club?
A. No, sir. They were student-organized and student-arranged. We had -- we'd visit places. Students would arrange where we could go visit places, like the Omaha Community Playhouse or things like that, and it was totally student-run.

* * *

[61] Q. Mr. Daubman asked you a few questions relative to your meeting with Dr. Findley and whether or not you requested or would have wanted the use of the bulletin boards. Going back to the initial meeting, when you first met with him, had you even thought about the use of the bulletin board?
A. No, sir.

Q. Had you thought about the use of the intercom which doesn't exist but --
A. No, sir.

Q. Had you thought about putting things in the newspaper?
A. No, sir.

Q. Had you thought about the Year Book?
A. No.

Q. What were you really looking for?
A. A place to meet.

Q. A place to meet at Westside High School?
A. At the high school, on campus.

Q. During the same time period that other clubs were meeting?
A. Yes, sir.

* * *

[62] Q. So the denial that you received from Dr. Findley and Dr. Tangdall, as you understand it, was only for the reasons they gave you, it didn't fit school policy and in Dr. Tangdall's case it violated separation of church and state, is that right?
A. Yes, sir.

* * *

[63] Q. If the school had or the School Board or Dr. Findley or Dr. Tangdall had required a sponsor, would that have been okay with you?
A. Yes.

Q. You wouldn't have had a problem with that, right?
A. No, sir.

Q. Okay. Would the sponsor that was provided by Dr. Findley or Dr. Tangdall in your view as you were forming this club have directed the activities of the club?
A. No, sir.

Q. Who did you expect to direct the activities of the club?
A. Students, simply like any other club that I was ever involved in that was not Choir. Other than Choir, all the arrangements were made by the students. It would simply be the same format as that.

Q. What would you expect the sponsor to do?
A. Be there as a -- as a school requirement and be there as somebody to observe and monitor, make sure that the students didn't tear up the room or the building or anything.

Q. Would that be any different than the sponsor that [64] you had in Drama Club?
A. No, sir.

* * *

RECROSS EXAMINATION

BY MR. DAUBMAN:

Q. Did your group of fellow students after the request was turned down ever meet at the high school to discuss religious matters?
A. No, sir.

Q. Why not?
A. Because we didn't have the same open "mods," quote, unquote. The students -- the way that the system is scheduled at Westside, students very rarely, especially sophomores, juniors, and seniors, have the same time free together. There would have been no way that all the kids

could have gotten together at the same time. Mostly any conversation about any religious matters was one one on one or two on two or about four or five kids at the most.

Q. Is the school open prior to the very beginning of home room?
A. Yes, sir.

Q. Okay. For how long a period of time?

[65] A. I used to come in on weekday mornings at about 6:30 or 7:00 when I was a sophomore.

Q. And what time did home room start?
A. 8:00 o'clock.

Q. During that period of time after your request for the club was denied, did you ask or did you get together with your fellow students to discuss religious topics?
A. No, sir.

Q. Why not?
A. Because it would have been almost like sneaking around behind the administration's back and we didn't want to -- we didn't want to be rebellious against the system. We didn't want to be anything but under the -- we didn't want anything to be without the knowledge of the school system because that wouldn't have been fair to the administration. That wouldn't have been fair to the system if we thought that we were going to organize something anyway.

* * *

[66] A. It depends on what your definition of a sponsor is. The sponsor would not be a person in the -- in the authority as to lead and such as my Drama sponsor -- or as my Choir sponsor was because he led and directed all of the student activities.

Q. I read too far. Except for the last clause dealing with "but the Christian Club would not have a faculty sponsor," do you agree or disagree with the statement I read?
A. I agree with that, yes, sir. I agree with that.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

Q. Miss Mergens, do you ever recall Dr. Findley or Dr. Tangdall having stated to you or in your presence that if you had just gone ahead and met and not said anything to anybody, that this whole thing wouldn't have happened and we wouldn't have a case here today or it wouldn't have gone as far [67] as it had gone?
A. Yes. Dr. Findley mentioned that to me. I don't know if it was a big formal statement or if it was just, "Well, if you wouldn't have said anything to us, it would be okay."

Q. If you just hadn't said anything and gone ahead and met --

A. Right.

Q. -- some place in the school?
A. Exactly.

Q. And why didn't you do that?
A. Because we felt that they should know. If we were going to be using the school and the facilities and all that stuff and meeting on a formal basis, we thought that the administration should know or that we should ask for permission because it's their school that they lead and organize.

* * *

[68] **ANDREA DAWN SIMMONDS,** called as a witness on her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[69] A. I graduated from Westside in June of 1985.

Q. And what high school did you attend at that time?
A. Westside High School.

Q. How long were you a student at Westside?
A. I was a student for three years.

Q. So you were a student from your sophomore year on until you graduated as a senior?
A. That's right.

* * *

[70] Q. I want to take you back a little bit, back to early 1984, perhaps even a little earlier. Do you recall at any time prior to the institution of this action ever talking to Bridget about forming a Bible Club at Westside High School?
A. Yes, I did.

Q. And when was that?
A. The fall of 1984, probably September, October.

Q. And in those discussions with Bridget what was the conversation, what type of discussions did you have, what did you discuss?

[71] A. Well, we were just discussing that there were several students at Westside that were Christians and were interested in having a group and we wondered if it would be possible to have a club or some sort of group that could meet after school at Westside.

Q. About how many people at that time were interested in having a Bible Club?
A. To my knowledge, I knew about ten.

Q. What did you discuss would be the purpose of the Club?
A. Mostly just have fellowship, and as a Christian that means reading the Bible, prayer, just talking about things that were important to us as Christians.

* * *

[72] Q. What type of a fellowship group did you envision having at Westside High School?
A. One that would meet after school or before school at the school in a classroom or somewhere.

* * *

Q. What type of activities did you want to engage in?
A. Fellowship, prayer, and reading the Bible and just discussing topics.

* * *

[73] Q. Now, the club that you and Bridget spoke about, was this to be open to anyone that wanted to attend?
A. Yes.

Q. But it would be open to any student that wanted to attend, is that correct?
A. That's correct.

Q. Why did you want to form a Bible Club at Westside?
A. I just had that need for me as a Christian to have fellowship because that's a real important part of my Christianity, just being able to be encouraged by other Christians, and so that's mostly what I wanted to get out of it.

* * *

[74] Q. Did any organization ask you to start a group at Westside High School?
A. No, sir.

* * *

[75] Q. Do you recall ever hearing any conversations with Bridget -- or during any of your conversations with Bridget any discussion about the opportunity or arrangements to meet [76] next door at the church?
A. Yes. She had said that Dr. Findley had suggested that to us.

Q. And what was your response to that?
A. I thought it would have been inconvenient for me because I usually worked in the evenings and I would have to have gone over there -- if it had been in the evening, I would have had to get a ride there and I would have been working and I also felt that they -- that they weren't giving us our rights since other clubs were meeting in the school and I thought we should be able to just meet in the school and not have to go across the street.

* * *

Q. What time of the day would you have anticipated the Bible Club meeting at Westside High School?
A. Before or after school hours.

Q. Did you anticipate having a faculty sponsor?

A. No. Actually, I hadn't thought about it. It didn't [77] matter one way or the other whether we did or not.

Q. If Dr. Findley or any other administrator had told you that you were required to have a faculty sponsor, would that have been okay with you?
A. That would have been fine with me.

Q. What was your impression of what a faculty sponsor would do?
A. Someone just to monitor the club and not to be involved in it but just to make sure that we were behaving ourselves.

Q. Did you anticipate having your Bible Club treated in the same way as any other club at Westside?
A. Yes, I did.

Q. Did you anticipate being able to use the bulletin boards or any other kind of inner-school communication system?
A. Yes, sir.

Q. Who was going to direct and lead the activities of the Bible Club?
A. The students that were involved.

Q. Were your parents or pastor asking you to be involved in that club at all?
A. No.

Q. Were they asking you to start a club at all?
A. No.

Q. Did you anticipate that your parents or your pastor [78] would be involved in the club at all?
A. No, I didn't.

Q. Why did you and Bridget feel that you needed to ask permission to meet for Bible Club purposes at Westside?
A. We just felt that we wanted to be above board and not do anything behind the administration's back. We wanted to clear it with them first.

Q. Do you recall how many students were interested in forming a Bible Club?
A. I knew probably about ten that were interested.

Q. Now, when you attended Westside were you a member of any other club or group that met as a school club?
A. Yes, I was in Choir and also in the International Club.

Q. Now, we will just talk about Choir here for a few minutes. As a part of the Choir Club -- first of all, tell me what Choir Club was.
A. Warrior Voices was a club and it also met, it was a class during the day but we also had times of concerts and practices outside of the class and it was considered a club. We had fund-raisers and things for the club and officers of the club and it was just a singing club where we did performances at places.

Q. And I take it Warrior Voices was the same as the Choir Club?

[79] A. That's right.

Q. And were you a member of Choir class at the same time?
A. Yes, I was.

Q. Who was the faculty -- or was there a faculty sponsor at Choir Club?
A. Yes, there was.

Q. And who was that?
A. Dr. Schuler. Mr. Schuler.

Q. Excuse me, I didn't hear you.
A. Mr. Schuler.

Q. Who was the teacher of the Choir class?
A. Mr. Schuler was.

Q. Were you graded at all for your participation in Choir Club?
A. Yes, for the performances were required and you could miss so many but you were encouraged not to miss any or your grade would be docked.

Q. So was attendance taken then at Choir Club?
A. Yes, it was.

Q. Was Choir Club restricted to students at Westside High School?
A. Yes, it was.

Q. Now, what type of activities did you do in Choir class?
A. We just sang.

[80] Q. Now, did Choir class meet at a different time than Choir Club?
A. No. They were together.

Q. Were some members of the Choir class -- were there any members of the Choir class who were not a member of the Choir Club?
A. There were different Choir classes and Warrior Voices was one. There were different choirs. There's a Glee Choir for sophomores, and so not all of the people in the Glee Choir were members of Warrior Voices but all the ones that were in the class of Warrior Voices were in Warrior Voices Club.

Q. Now, the faculty sponsor of the Choir Club, did he direct the activities of the Choir Club?
A. Yes, he did.

Q. And actively participate in all of the activities?
A. Yes, he did.

Q. And was he in attendance at all of the activities?
A. Yes, he was.

* * *

[81] Q. Can you tell me a little bit about what types of activities you engaged in in the International Club?
A. The Club was mostly structured to expose you to different cultures around the world and also to raise money for international students that were coming to Omaha or else students that were at Westside that wanted to go abroad.

[82] Were you required to attend that club?

A. No.

Q. That was a strictly student voluntary club?
A. That's right.

Q. Were you attending any other class at that time that related, in your opinion, to that Club?
A. I was taking Spanish at that time but it wasn't required in the class.

Q. What did you do in Spanish class?
A. We learned Spanish language.

Q. Did you have a faculty sponsor in the International Club?
A. Yes, we did.

Q. And who was that?
A. Mrs. Shote (phonetic) and Mrs. Davis.

Q. Pardon me?
A. Mrs. Shote and Mrs. Davis.

Q. What classes did Mrs. Shote teach, do you know?
A. She taught Foreign Language.

Q. And what about Mrs. Davis?
A. Mrs. Davis taught Spanish.

Q. Were they in attendance at all the club meetings?
A. Yes, they were.

Q. Did they actively participate in all of the club meetings?

[83] A. No. They mostly just sat and took attendance and there were officers of the club that mostly ran the club. They just were there to watch.

Q. Who were the officers?
A. Students.

Q. So the students directed the activities of the club?
A. That's right, yeah.

Q. Were any of the activities conducted off school campus or were they all on the school campus, the school ground?
A. Not to my knowledge, no.

* * *

Q. They were not off campus. While you were a member of the International Club do you recall ever having been given a credit in Spanish class for receiving a grade in Spanish class for having attended the International Club?
A. No.

Q. Did you receive a credit in any other class for having attended the International Club?
A. No, I didn't.

Q. Now, do you feel that you received a pretty good education at Westside High School?

[84] A. Yes, I do.

Q. Were you exposed, in your opinion, to a lot of diverse and controversial views?
A. Yes, I think I was.

Q. Will you explain a little bit about some of those views?
A. In a lot of different classes we had opportunity to talk about current issues, anything that was in the news, any politics that was in the news or issues like abortion, homosexuality, and we also had opportunity in some classes to talk about religion, atheism and different religions.

* * *

[85] Q. If a student wanted to discuss another subject other than the one in the book for that particular day, were you allowed to do that?
A. Yes. It was -- it was pretty informal and if someone had something that they wanted to talk about, a current issue or something, usually we would talk about it for the whole time or for part of the class.

Q. And what types of talks did you discuss?
A. We discussed abortion. We discussed a lot of political issues that I can't remember right now, but a lot of different issues.

Q. When you say you discussed abortion, do you mean that you just discussed the subject in general or did you

pose hypothetical questions about whether or not people should have abortions? Explain a little bit about your discussions of abortion.

A. There were hypothetical questions and we mostly took sides. We had opinions. Different people would have different opinions about abortion and we just discussed our opinions.

Q. Did the teacher at any time discuss an opinion?

A. Yes, he did.

Q. And what was his opinion?

[86] A. He had -- he had different opinions. It depended on who --

MR. DAUBMAN: Objection, Your Honor, hearsay.

* * *

Q. You said previously that you had discussed homosexuality in different classes. Would you tell me a little bit about that?

A. It was mostly in my English class my sophomore year we discussed it because it had come out in some of the literature that we were reading for the class.

* * *

[87] Q. Were you ever in attendance at any class at Westside when Planned Parenthood came in and gave a presentation?

A. Yes, I was.

Q. What class was that?

A. That was Sociology.

Q. And what occurred in that class?

A. We could come in any time during the day. We had to come in one "mod" and listen to the presentation by somebody who came representing Planned Parenthood on different methods of birth control and how they were used and their effectiveness.

Q. Was that a required class?

[88] A. Yes, it was.

Q. Were the students allowed to participate or ask questions in any way?

A. Yes, they were.

Q. Did you feel free in your classes at Westside to discuss these issues?

A. Yes, I did.

Q. Did you feel like you could give your own personal view and take a stand?

A. Yes, I did.

Q. In discussions on controversial issues, when a teacher took a stand did you see that as being the school's position or the position of that particular individual teacher?

A. I saw it as the position of that teacher, not of the school.

* * *

[89] CROSS EXAMINATION

BY MR. SIMMONDS (sic):

* * *

[90] Q. And I think you also mentioned that it was within that class that you discussed homosexuality or sexual preferences, is that correct?
A. That's correct.

Q. And I believe I heard you also say that was in connection with the book that you were reading in that class, is that true?
A. To the best of my knowledge, yeah.

Q. Do you recall the name of that book?
A. No, I don't.

Q. Do you recall if the content of that book dealt with homosexuality to some degree?
A. Yes, I think it did.

* * *

[98] Q. You mentioned that in the International Club one of the things that was done was some exposure to different cultures around the world, is that correct?
A. That is correct.

Q. Does that include the culture of Spanish-speaking countries?
A. Yes, it did.

Q. Bear with me a moment. Miss Simmonds, did you know other Christian students at Westside High School when you were a student there?
A. Yes, I did.

Q. And did you discuss religious matters with them on occasion while you were at the high school, in the building?
A. Yes, on occasion.

Q. Were you ever prevented from doing so by any member of the administration or faculty or staff of the high school?
A. Not during non-instructional time, we were not. We couldn't -- we couldn't talk about it during classes but we weren't prohibited any other time.

Q. During classes you were expected to talk about what was going on in the class?
A. That's right.

Q. But non-instructional time, as you're defining it, would include time between classes as opposed to just being [99] at the end of the day or at the beginning of the day?
A. Yes, sir.

Q. Do you feel that you were ever discriminated against by anybody at the high school, by anybody employed by the high school, on the basis of your religious beliefs?
A. No.

Q. Were you ever prevented by anyone at the high school administration, staff, faculty, from exercising your religious beliefs?
A. It was not being able to meet as a club.

Q. Was that the only exception?
A. Yes, I think so.

Q. Other than the -- and the club that you are talking about is the club that was requested by Bridget Mergens that she testified about this morning?
A. Yes, sir.

Q. Other than the club, were you ever prevented by anybody at the high school from exercising any rights of free speech?
A. No, sir.

* * *

[100] REDIRECT EXAMINATION

BY MR. DAVIS:

* * *

[101] Q. And you weren't prohibited during your times between classes from discussing controversial subjects?
A. That's right.

Q. Including abortion?
A. Yes.

Q. Or homosexuality?
A. Yes, sir.

Q. Or religion?

[102] A. Yes.

Q. But when you wanted to do that as a group, do that same thing, to discuss those subjects as a group, what happened?
A. As a club?

Q. Right.
A. We weren't allowed to.

* * *

[103] **KENDRA KELLISON**, called as a witness on her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[110] Q. Is it your desire right now as a plaintiff in this particular lawsuit to have a fellowship Bible Club at Westside High School?
A. Yes.

Q. Why do you want to have such a club?
A. Well, every day in school I'm faced with a lot of different things and I need the encouragement of other Christians to help me make decisions and just encourage me in everything that I do.

Q. Why not have such a group as you do on Monday night instead of in the school?
A. Because it can be inconvenient a lot of times. I don't drive and its' inconvenient to have to meet some place else other than where I am.

* * *

Q. Would you envision this group meeting after school?
A. Either before or after school. Either way it wouldn't be a problem.

Q. In the school building?

[111] A. Yes.

Q. Would you want it to be treated any differently than any of the other clubs that meet at Westside High School?
A. No.

Q. Would you want it to be made up of only Westside High School students or other students from other schools?
A. Just Westside students.

Q. Who would you want to direct the group?
A. I'd want it to be student-led but if we needed to have a faculty member there, then that would be fine.

Q. Would you want to be able to use the bulletin board to advertize the group?
A. Yes.

Q. The intercom system, if that's permitted?
A. Yes.

Q. Would you want to be able to have the group written up in the school newspaper?
A. Yes. I just want it to be treated the same as the other groups that are at the school now.

Q. You don't want anything different than what the other groups already have at Westside High School?
A. No.

Q. Do you believe that right now by not being permitted to have such a group that you are being treated differently at Westside High School?

[112] A. Yes, I do.

* * *

Q. Back to the club that you would propose to have, would this club discriminate against anyone based on that individual's religious beliefs?
A. No. Anyone would be -- it would be open to anyone to come, no matter what denomination they are.

Q. Would anybody be forced to attend it?
A. No.

Q. You say it would be student-run?
A. Yes.

Q. Miss Kellison, during your time at Westside High School have you had an opportunity in any of your classes to be exposed to controversial issues --
A. Yes, I have.

Q. -- or what you consider to be controversial issues?
A. I have been -- we have had class discussions on abortion, premarital sex, a lot of like civil rights and -- [113] and prejudices, things like that.

Q. In the area of premarital sex, what class did those discussions come up in?
A. They've come up in my English class and then they have also -- just like the school newspaper has put articles on about those, and publications at the school.

Q. In talking about the English class, how did premarital sex come up in the English class?
A. I don't really recall. I just -- a lot of times we just get on a tangent and just talk about whatever came up. Sometimes it's started through the book that we are reading at the time but a lot of times it was just a student brought up a subject and we'd talk about it.

Q. And the particular English class and the situation of premarital sex, did the teacher take a stand in the classroom?

A. A lot of times he'd take a stand just compeltely (sic) opposite of what the student was, just for sake of discussion.

Q. Did you ever formulate a belief in your mind that because a particular teacher took a stand that this was in fact the school's stand on a controversial issue?
A. No. I just -- just the teacher's personal opinion.

Q. But you were allowed to freely discuss this in the classroom?
A. Yes.

[114] Q. And freely discuss it in the hallways?
A. Yes.

Q. All around school?
A. Uh-huh. Yes.

Q. Okay. Did you ever find any difficulty in the school discussing religious subjects in class?
A. A lot of times something just from the Bible would be brought up in History or in Literature but I don't recall it ever being freely discussed as a topic for the day.

Q. Discussion just didn't take place or somebody shut off discussion?
A. I just don't think that it took place a lot of times.

Q. Have you ever been prohibited from discussing that in the school setting, religion in the school setting?
A. No.

Q. Okay. Have you ever been prohibited from discussing it after school?
A. No.

Q. How about in a club setting?
A. I'm not in any clubs.

Q. So there is no offer for you to discuss that, is that right?
A. That's correct.

* * *

[115] Q. All right. Does the newspaper discuss controversial issues?
A. Yes.

Q. And by the newspaper discussing these various controversial issues, has that ever led you to believe that [116] the school supports one side of the issue or the other just because it appears in the school newspaper?
A. A lot of times it's just a student's personal opinion but there usually are two views in the newspaper about it.

Q. If one view is advanced stronger than the other, it has never led you to believe that that is the school's position, has it?
A. No.

Q. Miss Kellison, if the school were to permit a Bible Club to exist at the high school, would you view that as the advancement of one religion over another religion?
A. No, I wouldn't because it would be inter-denominational and it would be open. I mean it would be based on

just the Bible and whatever the views the people have is -- it wouldn't -- I don't think that it would be. It's kind of hard to explain but I don't -- I don't feel that it's opposing one view or anything like that.

* * *

[117] CROSS EXAMINATION

BY MR. DAUBMAN:

Q. Miss Kellison, can you describe for me what you mean by "inter-denominational"?
A. Well, I believe -- I mean I believe certain things about -- like I interpret something differently than somebody else may, and like inter-denominational may mean that people from Assemblies of God and people that are Baptists or Presbyterian can all meet together.

Q. The club that you talked about in response to some of Mr. Veith's questions, am I correct in saying that you viewed that club to be a Bible study and Christian fellowship type of club?
A. It wouldn't -- I mean it doesn't necessarily have to be a Christian that could attend. It would be open to anybody.

[118] Q. Would one of the principal purposes of the club be to discuss the Bible and read from the Bible?
A. And fellowship, yes.

Q. Also in response to one or more questions from Mr. Veith, you said that in one of your English classes that there was some discussion within that class about premarital sex, is that correct?
A. Yes.

Q. Was it your testimony that you do not remember if that came up in the context of the book that you were reading?
A. I don't recall if that's how the subject got started but a lot of the subjects that we talked about did come from the books we were reading.

* * *

[120] Q. Were you required during your time that you have been at Westside to take History classes?
A. My sophomore year, yes, and I believe my junior year.

[121] Q. History is required subject matter in both your sophomore and junior years at Westside?
A. It's required in sophomore but I'm not sure if it is required in junior year or not.

Q. Which History class did you take as a sophomore?
A. World History.

Q. Who was your teacher?
A. The first semester I had Mr. Andreas and Mr. Nelson, and the second semester I had Mrs. Taylor and Mr. Marceau.

Q. You also took a History class a (sic) a junor (sic), is that correct?
A. Yes.

Q. And what History class was that, again?
A. U. S. History.

Q. Were the teachers present --
A. Yes.

* * *

[122] Q. You testified in response to some of Mr. Veith's questions that you feel having a student club along the lines of the club that you described was important to you on a daily basis so that the people in the club could mutually encourage one another and lift each other up. Is that a fair statement of what you said?
A. Not necessarily -- not that the club would have to meet every day but just -- you know, more than just Sunday.

Q. And how often would you envision such a club to meet?
A. Probably once a week.

Q. If such a club were allowed, would you continue with your fellowship group at Bridget Mergens' house?
A. Yes.

Q. You said, I believe, that you felt that you needed encouragement from your fellow Christian students on a

regular basis and you felt that was important in your life, is that correct?
A. Yes.

Q. Okay. Do you in fact talk about religious matters and give encouragement to your fellow students and receive encouragement from your fellow students at this time?
A. On a one-on-one basis, usually, when I'm scheduled with somebody -- when we don't have a class scheduled.

Q. During your free time?
A. Yes.

[123] Q. Before and after school, as well?
A. Yes.

Q. Have you ever -- I think you have just answered this but let me ask it in a different way. Have you discussed religious matters with your fellow students at Westside High School?
A. Yes.

Q. Have you ever been prevented from going so by any member of the administration, faculty or staff at the high school?
A. Yes.

Q. Have you ever been prevented from doing so by any member of the administration, faculty or staff at the high school?
A. Not on an informal basis.

Q. If arrangements could be made for this club that you would like to see to meet immediately before school or immediately after school at the building next door to the high school which houses the West Sdie (sic) Community Church, would that be an acceptable alternative to you?
A. It would be an alternative but I don't find it necessarily acceptable because I feel that we have rights as students to meet in the school like the other clubs do.

Q. If such arrangements could be made so that you could meet immediately before or immediately after school, that would solve your transportation and logistical problems, I assume?
A. In some cases, yes.

Q. In what cases would it not?
[124] A. My Dad has appointments and stuff and when he can or can't pick me up just depends.

Q. Okay. And that would be so whether you met at the church or met at the high school?
A. Yes.

Q. I believe you testified that you wanted this club to be treated as any of the other clubs at the high school, is that correct?
A. Yes.

Q. The use of bulletin boards, the PA system, coverage in the newspaper and Year Book, et cetera, is that correct?
A. Yes.

Q. What about a faculty sponsor?
A. If we had -- if it was required that we have one, then yes, we could have one. If we don't have to, then I don't see why we couldn't still have it. As long as it is required, then --

Q. You are flexible on that point, whether or not to have a faculty sponsor?
A. Depending on whether it was required or not.

Q. Required by the school?
A. Yes.

Q. Other than the absence of this sort of club at the high school that we have been talking about, do you feel that you have been prohibited by the school from exercising your [125] religious beliefs?
A. No.

Q. Other than the club we've been talking about, do you feel that you have been prohibited by the high school from exercising any rights of free speech?
A. No.

Q. Other than the club that we have been talking about, have you been prevented by the school from associating with your fellow students?
A. No.

Q. Do you feel that you have been discriminated against because of your religious beliefs, with the possible exception of the club that we've been talking about?
A. No.

* * *

[130] **MICHELLE MARIE HARRIS**, called as a witness on her own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[132] Q. Why are you asking to have a Bible Club at this time? Why are you involved in this particular lawsuit and request?
A. Because fellowship is very important to a Christian or actually really to anybody but it helps build a person up and, you know, strengthen them when they are down and --

Q. Would you explain a little bit about what you perceive you would be able to do in a Bible Club if it were allowed to meet?
A. Pray, if somebody needed prayer. Discuss an issue if somebody was confused about it. Read the Bible.

Q. Why do you feel that this is necessary to do this in a group setting as opposed to doing this as an individual?

A. Well, it -- it helps to know that there are other people that feel the same way you do and you can't really encourage yourself a whole lot. It helps to have somebody else standing there and saying, you know, "Hey, I'm behind you, I understand what you're going through."

* * *

[133] Q. Now, on the Bible Club, if a Bible Club were allowed to meet at Westside, would that club meet after school, before school, during school? When would it meet?
A. Before or after school.

Q. Would anybody be required to attend that club?
A. It's -- it would be on your own decision. If you wanted to go, you could go. If you didn't want to go, you didn't have to go.

Q. How do you feel about a faculty sponsor? Do you feel like you would like to have a faculty sponsor?
A. If it is required, we will have one. I'm not going to argue about it. I'm flexible either way.

Q. If the school required a faculty sponsor to be a club in Westside, then it would be all right with you?
A. Yes.

Q. Who would sponsor or lead the religious meetings?
A. The students would be the leaders. They would organize.

Q. Have your parents asked you to become a part of a Bible Club at Westside?
A. No.

Q. Do you attend church?
[134] A. Yes, I do.

Q. And where is that?
A. Glad Tidings.

Q. Has your pastor asked you to be involved at a Bible Club at Westside?
A. No.

Q. Do you foresee that they would be directing or sponsoring the group in any way?
A. No.

Q. If such a club were to meet today, would you become a member and actively participate?
A. Yes, I would.

Q. Why would you participate?
A. Because I -- I really feel that fellowship is very important in my life.

Q. Why can't you do this elsewhere? Why can't you do this at home?
A. I do do it at home.

Q. When do you do it at home?
A. I'll study the Bible and I'll have fellowship or I will talk with my family, as far as fellowship goes.

Q. Is that something that you do on a fairly regular basis?
A. I try every day.

Q. Why don't you -- or why can't you meet somewhere else? [135] Why can't you meet at the church next door?
A. Because I really feel we have the right to meet at the school.

Q. Do you know what the name of the church is next door?
A. I don't. No.

Q. Have you ever attended that church?
A. No.

Q. Do you know the pastor?
A. Huh-uh.

Q. Do you know any of the kids that attend that church?
A. No, I don't.

Q. Do you have any contacts at all with that church?
A. No, I haven't.

Q. Are you on school grounds during Monday through Friday?
A. Yes, I am.

Q. And you are on school grounds immediately after school ends on any given day?
A. Yes.

Q. So you would be able to attend a Bible Club if it met right after school?
A. Yes, I could.

* * *

[136] Q. How does it make you feel right now to know that you are not allowed to meet at Westside as a Bible Club?
A. I'm not too fond of it. I think it's kind of being a little bit discriminative.

Q. Are you a member of any other clubs at Westside?
A. Yes, I am.

Q. And what are those?
A. JCL, Junior Classical League; band; and Drama Club; and Welcome to Westside.

Q. What does Drama Club do?
[137] A. They have sponsored a couple of the plays that have gone on at the school. They've gone and visited other plays at other schools and they've had parties with -- over at a student's house -- houses.

Q. Go ahead.
A. That's all.

Q. Were the plays that were sponsored put on by the Drama Club?
A. No. They were put on by people who had tried out for it and --

Q. Was that in a Drama class?
A. No.

Q. So these were students who had tried out for some drama, particular play or particular event, and you sponsored that event?
A. Yes.

Q. Were those student events?
A. It was from the Westside student class. I don't know if it was from a class in particular.

Q. Do you know if that was from the Westside Drama class?
A. I don't know.

Q. Have you ever been a member of the Westside Drama class?
A. No, I haven't.

[138] Q. Do you know if there is a Westside Drama class?
A. Yes, there is, I believe.

Q. In your Drama Club, do you have a sponsor?
A. Yes, we do.

Q. And who is that?
A. Mr. Fortney.

Q. Do you know what class he teaches at Westside?
A. He teaches an English class, a sophomore English class, and the Drama class.

Q. Do you receive any grade or credit in the Drama class?
A. I don't know. I'm not in it. I'm not in the Drama class.

Q. Excuse me. Do you receive any grade or credit in the Drama Club?
A. I know they have had extra credit if you had attended that and written a report on it, attended one of the plays and written a report on it.

Q. So if you attend the Drama Club --
A. Not the Club, the plays.

Q. If you attend the plays, you get extra credit in the Drama Club for that?
A. Not the Club, the school -- the class, classes.

Q. But you have never been a member of the Drama class?
A. No. English class, it was for.

[139] Q. Okay. If I am to understand you correctly then, you got credit in English class for attending Drama plays, is that correct?
A. Yeah, as long as you had written a report up on it.

Q. Are you required to be in attendance at all the Drama Club meetings?
A. No.

Q. That is strictly voluntary?
A. Yes.

Q. Now, you said you were a member of the Junior Class League. Can you tell me a little bit about that?
A. It's Junior Classical. It's kind of like an organization or a group of people, mostly Latin students, that get together and just help out like other families, like a charity group might do, usually.

Q. Would you classify that as a service organization?
A. Yeah, I guess, usually.

Q. Do you go out and serve the public in any way in some of your activities?
A. Yes, we have.

Q. Is Latin class a required class at Westside?
A. No, it isn't.

Q. Is it an elective class at Westside?
A. Yes.

Q. Are you currently enrolled in Latin class?
[140] A. Yes, I am.

Q. And how long have you been enrolled in Latin class?
A. This is my second year.

Q. About how many people that are members of the Latin -- or of the JCL Club?
A. Probably between 20 and 25 students.

Q. And does that have a sponsor?
A. Yes, it does.

Q. And who is that?
A. Mr. Connor Wilcox.

Q. And what classes does he teach?
A. He teaches Career Ed, Book Habit Enrichment, and Latin.

Q. Do most of the kids who attend JCL Club also attend the Latin class?
A. Most of them, yes.

Q. And do most of the people who are enrolled in the Latin class also attend the Club?
A. Most of them, yes.

Q. Is the Club required as a part of the Latin class?
A. No, it isn't.

Q. Is attendance taken?
A. No.

Q. Do you receive any credit in Latin class for your participation in the JCL Club?
[141] A. No.

Q. You also mentioned that you were a member of the Band Club, is that correct?
A. Yes.

Q. Is there a Band class at Westside?
A. Yes, there is.

Q. Can you explain the difference between the Band class and the Band Club?
A. As far as I know, they're kind of one and the same.

Q. Excuse me, I can't hear you.
A. They're like one and the same, kind of like they're talking about with Choir.

Q. Is the Band Club a voluntary club?
A. You have to be in Band to be in it. I don't know --

Q. So Band Club is required as a part of Band class, is that right?
A. Yeah, I guess.

Q. You're not sure?
A. I've -- I've never taken them apart. I mean it's like if you're a part of Band, you're just part of Band.

Q. Do you receive -- do you have separate meetings? Is there a separate meeting for Band class as opposed to a meeting for Band Club?
A. No.

Q. Does the teacher take attendance?
[142] A. Yes, he does.

Q. In the Band Club and in the Band class?
A. In the Band class.

Q. Okay. So in your mind you can't see any differentiation between the Band Club and the Band class, is that correct?
A. That is correct.

Q. You are given credit, is that right?
A. Yes.

Q. And you receive a grade for that, is that right?
A. Yes.

Q. Are you required to participate in all of the Band activities?
A. Yes, you are.

Q. If you fail to participate at a Band activity, would you be graded down for that?
A. Unless it was a pep band where -- they have -- Band has two different pep bands where they'll split the band up when they go outside of the school to a game or something and if you are called to be on one pep band, you're supposed to be there unless you can find a substitute, and then if you're not -- if you

don't have the substitute or if you're not there, then you do -- it's a mark against you.

* * *

[143] Q. Okay. Is the teacher present at all the Band Club activities?
A. Yes, he is.

Q. And does he actively participate?
A. Yes.

Q. And that's the same teacher that's also with the Band class as a whole?
A. Yes.

* * *

[144] A. (sic) Do you feel like you are able to make a distinction between the activities that the school requires you to attend and the ones that you just want to participate in?
A. Yes.

Q. And do you participate in any those clubs you have a special interest in?
A. Yes.

Q. Do you have a special interest in forming a Bible Club?
A. Yes, I do.

Q. And you would like to form that Bible Club at Westside, is that correct?
A. Yes.

Q. And that would meet after school hours?

A. Before or after school.

Q. Okay. If you were allowed to have that club meet, would you require attendance of any student?

[145] A. (No response.)

Q. Would you require students to attend? Do you feel like it should be required?

A. No.

Q. So it would be completely voluntary, is that correct?

A. Correct.

Q. Now, you are a junior at Westside, is that right?

A. Yes.

Q. During your two years at Westside have you ever heard of any other student club being denied the right to meet?

A. No, I haven't.

* * *

CROSS EXAMINATION

BY MR. DAUBMAN:

* * *

[146] Q. Okay. I want you to describe for me the type of club that you would like to see meet at Westside High School that you were talking about in your responses to Mr. Davis' question. Could you describe the club for me, please?

A. This is a club that anybody could be able to meet in. That would be discussing the Bible or being prayer, having prayer.

Q. This would be a Christian Club?

A. It's for anybody who really wans (sic) to meet. It doesn't matter whether you are Christian, Jewish or anything.

Q. Okay. And you would be discussing the Bible and having fellowship?

A. Yes.

[147] Q. Is this the type of club you are looking at?

A. Yes.

Q. Would you want the club to be allowed in the same manner and under the same terms and conditions and so forth as all of the other clubs at Westside High School?

A. I would like to see that.

Q. Would that include the use of the bulletin boards to announce the existence of the club and the dates and times of meetings of the club?

A. I'd like to see as part of our equal access the school -- we would like to meet, but even if we didn't have the chance to use the bulletin board or anything.

Q. I will ask you some questions along those lines, too. Let me go through what you want in a club and then I will ask you some questions on what you would accept in a club. Let's handle it that way and maybe we won't get so muddled up. For

purposes of what you would like in a club, you would like to have the use of the school bulletin boards, as I mentioned a moment ago, is that correct?

A. I'd like to see that, yeah.

Q. Would you also want for this particular club coverage, if you will, in the student newspaper and in the Year Book the same way as other clubs are covered?

A. Yeah.

Q. Would you want to have the school recognize and [148] endorse the club as a Westside High School student club and organization?

A. I would like us to be recognized whether we're endorsed or not. They don't necessarily have to say that they agree with the people but to allow them to be able to meet, I would like to see that.

Q. Would it be acceptable to you, with the school's knowledge, to meet informally either before or immediately after school at the high school but not have it be a Westside High School club? In other words, would it be acceptable for your group to meet informally before or after school at the high school and not have all of the benefits of the other clubs and organizations at the school?

A. I think it would be acceptable but it's something, I guess, that I really would not have. We'd like to have the school's permission to actually be a fellowship Bible Club.

Q. If arrangements could be made to meet at the church next door to the high school immediately before or immediately after school for your club or group to meet, would that be acceptable to you?

A. It would be another alternative but, again, I think we do have the right to be able to meet at the school.

* * *

[152] Q. Miss Harris, you testified that you were involved in Drama Club, is that correct?

A. Yes, that is.

Q. And one of the activities was to sponsor plays, is that correct?

A. Yes.

Q. Could you explain to me what the Drama Club did in sponsoring these plays? What part did you play as a club?

A. They would put up posters or help with the background settings, sometimes setting them up.

Q. Would the Drama Club on occasion construct scenery?

A. The background, yeah.

Q. Be involved in the lighting and so forth of the production?

A. That was probably done with people who knew electronical stuff.

Q. Anybody from the Drama Club participate in that, though?

A. I have no idea.

* * *

[153] REDIRECT EXAMINATION

BY MR. DAVIS:

Q. You testified that you were not a member of the Drama class, is that correct?
A. Not of the class, no.

Q. Have you ever been a member of the Drama class?
A. No, I haven't.

* * *

KEVIN EARL BROWN, called as a witness on his own behalf, being first duly sworn, testified as follows:

[154] DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[156] Q. Are you a member of any or are you involved in any outside student activities that take place after school at Westside?
A. I was wrestling and weight-lifting.

Q. Tell me a little bit about what you do in weight-lifting.
[157] A. Basically it's -- we kind of talked earlier about modular scheduling, like usually it opens up around 2:30, the weight room will, and it's supervised, like we have hall monitors, bouncers we call them, that usually open the weight room up and close the weight room,

and they are usually there, you know, most of the time, and just more or less it's for athletes or for just people who want to go and lifting weights just for strength. I don't know what it would be for.

Q. Is that primarily open to the students?
A. Yeah. There are some people that -- there are some outsiders that come in I think that either graduated from Westside that I have seen in there, that come in and lift weights, like UNO students, college students.

Q. Now, you talk about the monitors. Are those faculty members at Westside?
A. Yes. They are. Yes.

Q. And how do they become involved in this weight-lifting? What kind of activity are they involved in there?
A. I think more or less it's like -- I think Dr. Huston, I think he might -- he's the Athletic Supervisor or whatever it is. He, I guess -- either him or Mr. Hering must ask, one of them, like there's three different bouncers, I don't know, if they would like to open the weight room up. Hurley, Jeff Hurley, he's one of the hall monitors. He's like a football coach, sophomore football coach, so he will open [158] it and it's kind of like equal time, sharing time, and there's another bouncer that will open it up, too.

Q. Do these hall monitors instruct you on how to weight lift?

A. No. It's -- you can get on a program that -- I don't know who types it up, but there is a program that is offered if you want to use it. Otherwise, it's optional. More or less -- I think most people just go by their own program.

Q. So I take it is attendance voluntary then?
A. Yeah. Well, wait, no, it isn't. They can just --

Q. Are you required to attend that weight-lifting?
A. No.

Q. Do you get a grade or receive any credit for P.E. for attending that?
A. No.

Q. Do these hall monitors attend all the club meetings, all the activities at the weight-lifting?
A. It's usually -- it's hard to say "Yes." Whoever, like if it would be one of the hall monitors opening it up, kind of like I guess they all have schedules. I don't know how they do it. If one day it's a hall monitor that opens the weight room, maybe the next day the -- Hering, he's another football coach, he might open it. It's just kind of like it kind of rotates around. It's usually someone's in [159] there but I have no idea how they do their thing, but someone's usually in there.

Q. What do they do while they're in there?

A. They usually -- well, sometimes they lift weights. Sometimes they just sit around and help people like if they need help, if they need -- like say they're squatting, say they're bench pressing, you know, if they need someone to support them, they're there.

* * *

[161] Q. Do you feel that you can distinguish between things that happen that are required by the school as opposed to things that are permitted by the school?
A. Yes.

Q. Do you feel that you can distinguish between school-endorsed activities and individually endorsed activities?
A. Yes.

* * *

[162] Q. You testified at the weight-lifting activity that other people outside Westside attended, is that correct?
A. That's correct. It seems like graduates from Westside are usually there. I've seen -- I mean I know their names, I know their faces, I know they went to Westside, and they no longer attend there and they come in weight-lifting.

Q. Were those college students?
A. Yeah. I think they're attending college.

Q. Did they attend the weight-lifting activity on a regular basis?
A. I know -- like a few I know who go to Lincoln who come up I've seen in there. I guess they're on break. Maybe they just come up for the weekend, I don't know. More or less yes. I've seen faces -- usually I've seen faces in there that attend regularly that are in college.

Q. And the students were allowed to attend the weight-lifting, as well?
A. Yes.

* * *

[163] BRYAN PHILLIP RENSING, called as a witness on his own behalf, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[165] Q. Did [Miss Mergens] ever discuss with you the formation of a fellowship or Bible Study group at Westside High School?
A. Yes.

Q. And do you remember when this was, approximately?
A. I think it's about late January, '85, or early February, '85.

Q. Did she share with you what she understood this group [166] was going to be like?

A. Well, I had assumed what it would be because I had been to other Bible Studies, so that wasn't really discussed. I just assumed what it would be.

Q. What did you assume it was going to be?
A. Getting together a body of believers, of Christians, getting together to share our faith with each other and build each other up and encourage each other.

Q. Is there a common term for this?
A. Fellowship.

Q. Do you believe that fellowship is an important part of your life?
A. Yes. It's Biblical principle.

Q. What do you mean by "It's a Biblical principle"?
A. It's taught in the Bible, it's taught that we should get together to lift each other up and to encourage each other to face the day and to face our trials and temptations that we face each day.

Q. So you believe that it is something that you are required to do?
A. Correct.

Q. Just on Sundays?
A. No.

Q. Is it part of your daily life?
A. Right.

* * *

[167] Q. Is it still your desire today to have the same type of -- or to have a Fellowship Bible Club at Westside High School that would be the same as any of the other non-class type clubs that exist there?
A. Absolutely.

Q. And that's the same type of group that was proposed by Miss Mergens?
A. Yes.

Q. You wouldn't want to be treated any differently?
[168] A. No.

Q. Did Miss Mergens ever discuss with you the fact that she requested to form such a group?
A. Yes, she had talked to Dr. Findley.

Q. And did she tell you what his response was?
A. She said that he had said, "No."

Q. You understand that this group that she was proposing was going to be a Christian fellowship group, right?
A. Yes.

Q. That it was going to be voluntary?
A. Correct.

Q. So you wouldn't necessarily limit it to Christians?
A. Right.

Q. Would it be student-led?
A. Yes.

Q. Now, I will discuss with you briefly the area of sponsorship. Have you thought about having a sponsor of the group?
A. I hadn't thought about it. That was something that was -- that we hadn't even reached yet, but if the school required it, then we would require it. So --

Q. You weren't going to oppose having someone in the room --
A. Right.

Q. -- at that time the club was going on?
[169] A. Right.

Q. Would you expect that person to direct or lead the activities of the group.
A. No.

Q. Do you ever recall Miss Mergens maybe discussing with you the fact that somebody had suggested that the group maybe meet next door in the church?
A. Yes.

Q. Would that have been an acceptable place?
A. No.

Q. Why not?
A. It's a little bit inconvenient. That's kind of like asking the Chess Club to meet over there, at the church. It's inconvenient and it would be -- one of our problems is

already solved. Everybody is at school already. The transportation wouldn't be a problem. Or at school there are empty classrooms after or before school that -- that I feel should be made available.

Q. As a result of the group not being permitted to form at Westside High School in 1985, was there a group that did form and met outside of the school?
A. Yes.

Q. And where did that particular group meet?
A. At Bridget Mergens' house.

Q. Did you become a member of that group?
[170] A. I had attended off and on as my schedule allowed.

Q. So you knew there was one in her home or somebody's home that you could attend if you wanted to?
A. Yes.

Q. Why didn't you attend it regularly?
A. My schedule was such that it didn't allow me to all the time. I had work that I had to do sometimes. You know, I had to go to work.

Q. How would that be different than a group that was formed at school?
A. The scheduling would be a little bit different. We could have it in the morning, before school, or we could have it right after school when work responsibilities wouldn't begin until --

* * *

Q. Tell me a little bit about a club known as Subsurfers.
[171] A. Well, what it was was a teacher by the name of Harley Hartison (phonetic), he would bring in some equipment, scuba equipment, air tanks and the like, and we would play around with them in the pool, we would swim with the equipment on and --

Q. Did Mr. -- was it --?
A. Hartison.

Q. Did Mr. Hartison stay there the entire time?
A. Yes, he was there just to supervise and make sure nobody got hurt.

Q. Did he instruct on the use of the equipment?
A. No. Just -- just at the beginning, just so you knew what you were -- just so you knew what you were doing. It was very basic.

* * *

[174] Q. You can seen under Number V, "Lessons PADI Scuba Certification," and below that is "Cost: $100.00 for WH students," and do you assume that to be Westside High School students?
A. Yes.

Q. And then $150.00 for adults?
A. Yes.

Q. Were there adults that also sometimes showed up at this club to get their certification?
A. Yes.

Q. They attended this at the same time period you were there in the club, is that correct?
A. Yes.

Q. Approximately how many students and how many adults would appear at any given club meeting?
A. Like I said, a top was probably 20, 20 students, and at the most 10 adults, I guess.

Q. The adults were not students at Westside High School, were they?
A. No.

Q. In addition to that organization, I believe that you said you were also a member of Welcome to Westside, is that correct?
[175] A. Yes.

Q. What did Welcome to Westside Club do?
A. Oh, it was -- it served as a group of people who were willing to take around new students and show them around the building, and what we did is we had luncheons for the new students so they would have somebody to get to know and, you know, so they just wouldn't come to school and be left, you know, so they

wouldn't know anybody. It was just a way for them to get to know people.

Q. Was there a faculty sponsor of Welcome to Westside?
A. Yes.

Q. And what was the sponsor's name?
A. May Ann Ricketts.

Q. What did she do at Westside High School? Was she a teacher?
A. She was a counselor.

Q. She doesn't teach, though, right?
A. No.

Q. Did Welcome to Westside have regular meetings?
A. I'm not sure. They had it -- at the beginning they probably had it once a week but later on I think it moved to probably once a month or so, but usually what happened was if they had an activity it was announced in the announcements or Miss Mary Ann Ricketts would -- she would know of a new student and introduce one of the members of the club to the [176] student so we could show them around. So it didn't really meet too regularly.

Q. Mr. Rensing, what did Miss Ricketts do as the club sponsor? What did she do in the club?
A. She just introduced new students to us and kind of got -- got the -- got the whole club going because, you know -- she got the names of the new

people and gave them to us and introduced them to us and then set us loose.

Q. Was Welcome to Westside Club a required club that you would be in for Sociology or something like that?
A. No.

Q. Was -- did you receive a grade in any course, an extra credit in any course, by reason of having been in Welcome to Westside?
A. No.

Q. You weren't required to attend the club?
A. No.

Q. And you weren't required to attend any class, correct?
A. No.

Q. Is there any class that you can conceive of that Welcome to Westside was tied to?
A. No.

Q. Back to Subsurfers. In Westside High School are you required to take Physical Education as one of your classes?
A. Yes.

[177] Q. Did you ever receive any extra credit in any of your Physical Education classes by reason of having been in Subsurfers?
A. No.

Q. Did you ever receive any -- rate any sort of additional benefit or treatment in the Physical Education curriculum by reason of having been in Subsurfers?
A. No.

Q. Were you required by any of your Physical Education classes to be in Subsurfers?
A. No.

Q. To your knowledge, is Subsurfers listed in the Year Book?
A. Yes.

Q. As an activity of the school?
A. Yes.

* * *

[179] Q. Mr. Rensing, while you have been at Westside High School have there ever been any opportunities where you've been that you have been able to enter into discussions concerning controversial activities?
A. Yes.

Q. Would you please described for the Court some of those particular activities that have occurred in the school?
A. Well, during my junior year during a -- in a class called Am Lit, American Literature Survey, we had a movie or excerpts from the movie called The Omen was shown, which dealt with some things that are contrary to my beliefs and --

Q. What sort of things did that particular movie deal with that were contrary to your beliefs?
A. Satanism, that Satan dominates over God and --

Q. You saw this in one of your regular curriculum classes?
A. Right.

Q. And you were then placed in a position where you had to discuss the movie?
A. I don't remember there being any discussion after that.

Q. It was just presented in class and just left at that?
[180] A. Right. I don't -- I don't even know -- I don't remember if there was any discussion. What we had been doing was studying things like Puritanism and had been reading the book called The Crucible, you know, dealing with things like witches from early times and books about witches. That's what The Crucible is about, is witches in Salem.

Q. And then this movie was shown in that class, also?
A. Right.

Q. Or excerpts from it, at least?
A. Right.

Q. In your opinion, as you saw that movie and as it was presented in class, was the school in any way endorsing the practice of Satanism or the religion of Satanism?
A. No.

Q. It didn't confuse you at all, did it?
A. Well, I -- the thing that did confuse me is why they wouldn't -- wouldn't mention anything until the day of it because of -- because of the fact that there are kids who would object to that sort of thing, such as me, like I was surprised that they didn't have an alternative assignment or something to do instead of having to go and see that. They didn't really provide an option.

Q. You were required to be there and see this?
A. Right.

Q. What other sorts of activities, controversial [181] activities have taken place at Westside that you can recall?
A. They have -- we have had discussions, you know, in most classes, where you would discuss social problems and politics and civil -- civil rights and things of that nature.

Q. Was abortion discussed, too?
A. Yes.

Q. Premarital sex.
A. Yes.

Q. These were all in required classes or elective classes?
A. Yes.

Q. In these particular classes, did you find your instructors on occasion taking one side or the other?

A. Yes.

Q. And by them taking that one side or the other did you view that as the school's endorsement of that particular stand, whatever it might be?
A. No.

Q. Were some of the stands that they took different from your own?
A. Yes.

* * *

[182] Q. In your opinion, had the School Board permitted such a club to meet, would you have seen that as the school giving more benefits to one religion over another?
A. No.

Q. You wouldn't have objected, would you, if somebody suggested that say a Jewish Club be formed, would you?
A. No.

MR. DAUBMAN: Objection to the form of the question, Your Honor.

THE COURT: Yes, it's leading and suggestive.

Q. Would you have objected to a Jewish Club?
A. No.

* * *

[185] CROSS EXAMINATION

BY MR. DAUBMAN:

* * *

Q. Under subheading Roman numeral V where it talks about the lessons for PADI Scuba Certification, do you see what I am referring to?
A. Yes.

Q. That Scuba Certification, was that conducted by someone other than Westside High School?
A. Yes.

[186] Q. It was conducted by Underwater World, is that correct?
A. Correct.

Q. That was something optional, entirely up to the individual?
A. Yes.

Q. And it was the adults that participated in that certification?
A. Yes.

* * *

Q. Do you know other Christians at Westside High School?
A. Yes.

Q. Have you discussed religious topics with them at the high school?
A. Yes.

Q. Have you ever been prevented from doing so by an employee of the high school?

A. No.

Q. Has any employee at the high school ever prevented you from engaging in any free speech activity?
A. No.

Q. Has any employee of the high school prevented you from freely associating with your fellow students?
A. No.

Q. For religious purposes or otherwise?
[187] A. No.

Q. Has any employee of Westside High School inhibited you in any way other than the Bridget Mergens club from exercising your religious beliefs?
A. No.

Q. With respect to the film, The Omen --
A. Yes.

Q. -- did you ask to be excused from that class?
A. At the beginning of the class the teacher had mentioned that we were going to watch the movie and she had mentioned that if you didn't want to see it, to talk to her or something, but this was in a large group setting and I'm not sure how many kids there were in it, maybe 150, I'm not sure.

Q. You elected to stay to see the movie?
A. Yes, I did because I -- I was in the middle of a row and -- and --

Q. Did you testify earlier that Physical Education was a required course at Westside High School?
A. Yes.

Q. And as part of that required course, is there a swimming unit? Does part of the course deal with swimming?
A. Yes.

Q. That used the same pool as the Subsurfers did, I assume?

[188] A. Yes.

Q. Is there a swim team at Westside High School?
A. Yes.

Q. Do you feel the swim team is related to any particular class at Westside High School?
A. No.

Q. Is there a football team at Westside High School?
A. Yes.

Q. Do you feel that is related to any particular class in the high school?
A. No.

Q. Are there one or more cheer-leading squads at Westside High School?
A. Yes.

Q. Do you feel they are related to any particular class in the high school?
A. No.

Q. Are there one or more drill teams in the high school?
A. Yes.

Q. Do you feel they are related to any particular --
A. No.

Q. -- class in the high school?
A. No.

Q. Is there a National Honors Society?
A. Yes.

[189] Q. Were you a member of National Honors Society?
A. No.

Q. Are you aware of other -- are there many other sports programs and athletic teams and intermural (sic) sports at the high school?
A. Yes.

Q. Do you feel any of those are related to the high school curriculum?
A. No.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

Q. Mr. Rensing, you testified on Cross Examination that you were never prohibited from discussing religious subjects in the school during free times, correct?
A. Yes.

Q. During those free times was there always someone present from the administration that participated in those conversations?
A. No.

Q. Was there ever anyone from the administration present when you participated in religious speech or discussions in the high school?
A. No.

[190] Q. You were answering a question, I believe, in reference to the excuse from the movie, The Omen.
A. Yes.

Q. You were stating that it was a large class setting and you were not allowed to finish your answer. What else were you going to say about why you didn't go forward and ask to be excused?
A. Because I guess I was embarrassed to get up. I don't know. I didn't want to bother anybody else, also. I was in the middle of a row where I would have been bothering a lot of people and I guess that's why I didn't.

Q. Were you caught by surprise as far as the movie and your opportunity to be excused?
A. Yes. I was -- the thing I was surprised about was the opportunity wasn't given earlier, prior to the class even beginning.

Q. Back to the area of Subsurfers and Exhibit 58, which I believe you have in front of you, Mr. Rensing, is my understanding correct that the high school permitted an outside group or an outside group to come into the high school during the club period?
A. Yes.

Q. And instruct within the club structure?
A. Yes.

Q. And you as a club member could have participated in [191] that, right?
A. Yes.

* * *

THE COURT: Did you take swimming at Westside High School?

THE WITNESS: Yes.

THE COURT: That was part of your Physical Education program?

THE WITNESS: Yes.

THE COURT: Were you in the Physical Education program when you were part of the Subsurfers organization?

THE WITNESS: Yes.

THE COURT: Did you get extra credit for participating in it?

THE WITNESS: No.

* * *

[192] **KEVIN DALE COATES**, called as a witness by the plaintiffs, being first duly sworn, tsetified (sic) as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[193] Q. And what was your understanding of [proposed Bible] club?
A. We would meet and we would discuss between us the problems and the good things of the day, to encourage each other in our beliefs and basically just to have other friends as Christians that share your same problems.

Q. Have you ever been a member of any other clubs at Westside?
A. Yes.

Q. And what clubs are those?
A. Last year I was a member of the Computer club and this year I'm a member of Subsurfers.

Q. And what activities are in the Computer Club?
A. They met once a week after school and basically their function was to make the people at Westside more familiar with the way computers run and their function and what they could be used for.

Q. Did the club meet on a regular basis?
A. Yeah. We met every Wednesday, I think it was.

Q. And was that throughout the entire year?
A. Yeah.

[194] Q. Approximately how many students were members of that club?
A. I suppose there was about 25.

Q. Did that club have a student sponsor?
A. No. It had -- it had a sponsor -- yeah, there was a sponsor, Mr. Dennis McIntyre. He was a supervisor of the computer room at Westside.

Q. Was he a teacher?
A. No, he didn't teach. He just -- he just watched the ICM, the computer room.

Q. Do you recall approximately how many Computer Club meetings you attended last year?
A. I attended just about all of them. I was the president.

Q. And of all those club meetings that you attended, how many would you say were attended by Mr. McIntyre?
A. He would usually be there but he wouldn't take part in our meetings very often. He would just maybe listen to what we were saying or something but he wasn't there for, I don't know, about a fourth of them and he usually didn't participate in our conversation.

Q. So there were club meetings that occurred where he was completely absent?
A. Right.

Q. Did this club meet on the school premises?

[195] A. Yes, it met in the computer room.

Q. At what time?
A. After school, at 3:10, on Wednesdays.

Q. Was it a voluntary club?
A. Yes, it was voluntary.

Q. Is there a computer class, to your knowledge?
A. Yeah, there are computer classes but they don't deal with the same subjects.

Q. How does the Computer Club differ from the computer class?
A. The computer classes were mainly to teach the students how to use a computer language and write their own programs and a little more involved, and the Computer Club was basically just to familiarize people with what the computers could do for them.

Q. Were you enrolled in a computer class last year?
A. Yes, I was enrolled in -- I forgot the name of it -- I think it was Pascal (phonetic) class where we learned the language of Pascal.

* * *

[196] Q. In your opinion, was the club related to any other curriculum club or any other curriculum offered at Westside other than the computer class?
A. No.

Q. You also said that you were a member of Subsurfers.
A. Right.

Q. When were you a member of Subsurfers?
A. I still am this year.

Q. Does that have a faculty sponsor?
A. Yes. Mr. Harley Hartison.

Q. And what does he do?
A. He provides the equipment and basic knowledge of how to run the equipment.

Q. Is he present at all the club meetings?
A. Yes.

Q. Is it voluntary? Is the club voluntary?

MR. DAUBMAN: Your Honor, I would like to object to the line of questioning on Subsurfers. It's redundant to the prior testimony.

THE COURT: Perhaps but I will let the witness answer.

A. Yes.

Q. Are you a member of the swim team?
A. No.

Q. Do you participate in any required swimming activities [197] at the school?
A. There was required swimming activity when I was a sophomore in P.E.

Q. But were you a member of Subsurfers at that time?
A. No.

Q. Is attendance taken at Subsurfers?
A. No.

Q. Have you ever received any -- or did you ever receive any credit when you were a member of the swim team last year for attending -- scratch that. Have you received any credit for attending Subsurfers in any class?
A. No.

Q. Are you graded at all for attending Subsurfers?
A. No.

* * *

[198] Q. Why do you want to attend a Bible Club at Westside?
A. Because I feel that it would let me get to know more Christians that I could maybe see every day. Maybe there's some people at Westside that are Christians that I don't know or maybe there's some people at Westside that would like to become Christians and follow God.

* * *

[202] **DEREK NEIL STONEBURG**, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[205] Q. What is [Mr. Hurley's] function in the school?
A. They make sure that you have a pass if you leave school or that if you are walking in the halls that you go to a study area and study. They just pretty much keep the school running smooth.

Q. Mr. Stoneburg, did you come to know about the intermural program through the Fair that occurs in the fall, the yearly Activities Fair?
A. No, I didn't.

Q. How did you come to the knowledge of the inter-mural (sic) program, the activity known as inter-mural (sic) basketball?
A. Well, I tried out for basketball and I didn't make it and when I found that out I found out they do have inter-murals (sic). That's how I found out, through friends.

Q. Did you attend the Activities Fair that occurred at the beginning of the last school year?
A. I don't remember.

Q. Other than inter-mural (sic) basketball, are there any other activities that you have been involved in at Westside High School?
[206] A. My sophomore year of basketball on the team is the only thing.

Q. As far as any of the other clubs are concerned, Chess Club, any of those?
A. No.

Q. Mr. Stoneburg, as a result of being in inter-mural (sic) basketball -- scratch that question. At Westside High School during your sophomore year were you required to take athletics, P.E., if you will?
A. Yes, we were.

Q. What did that particular part of the curriculum consist of? What did you do during your sophomore year?
A. In Gym class we just basically went over different sports we played, such as like, you know, when it was warmer we played outside, such as soccer and tennis, and when it got a little colder out we would stay inside and play basketball and paddle ball, things like that.

Q. Did you receive a grade in Physical Education class?
A. Yes.

Q. As a result of being on the basketball team during your sophomore year, did you receive a higher grade or any type of extra credit in the P.E. curriculum?
A. Not that I know of, no.

Q. As a result of being in inter-mural (sic) basketball during your junior year, did you receive any extra credit or [207] higher grade in your Physical Education course?
A. No.

Q. Did you take Physical Education during your junior year?
A. No.

* * *

Q. You know that Westside High School does not have a Christian or, if you will, a Bible group of fellowship group at the high school?
A. Yes.

Q. Are you, yourself, a Christian?
A. Yes, I am.

Q. Where do you attend church?
A. Evangel Assembly of God.

Q. If a club as was proposed by Miss Mergens were formed at Westside High School, would you consider becoming a member of that club?
A. Yes. If it did fit into my schedule, I would.

* * *

[208] Q. Do you believe as part of being a Christian that daily fellowship is an important part of your life?
A. Yes, I do.

Q. If such a club were offered at the school, you would be interested in it if it would work into your schedule?
A. Yes, I would.

Q. Do you work after school?
A. No, I don't.

Q. Would it be more convenient for you to have the availability of such a club at the school?
A. Yes, it would.

Q. You would understand, would you, that this type of a club would be a voluntary club that you could or could not join, depending on your choice, right?
A. Yes.

Q. If Westside High School were to permit such a club, would you see this as the high school favoring one particular denomination over another?
A. No.

Q. One particular religion over another?
[209] A. No.

Q. Just one other question. Mr. Stoneburg, as a result of your P.E. curriculum during your sophomore year which I understand was required, were you required to also be a member of the basketball team?
A. No, I wasn't.

* * *

[210] **JENNIFER RENEE HILT**, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[211] Q. If a Bible Study were permitted to meet at Westside, would you attend and participate actively in that club?
A. Yes, I would.

Q. And why is that?
A. Religion is -- I mean fellowship is a big part of my religion and I just feel that the time we do talk about religion at school is not enough, just in between classes and in classes, and that as Christians we need to get together, together.

Q. Are you a Christian then?
A. Yes, I am.

* * *

[212] Q. Are you currently a member of any club at Westside?
A. I am currently a member of FBLA, which is Future Business Leaders of America.

Q. What types of activities does FBLA engage in?
A. They have fund raisers, and those fund raisers, the money from that goes to send people to Leadership Conferences.

[213] Q. Have you personally participated in any of those activities?

A. I had sold -- like I have sold in the concession stand for a while but I have never been to a Leadership Conference.

Q. Have you ever taken any Business classes at Westside High School?
A. Yes, I have.

Q. And what class was that?
A. I have taken Accounting and I have also taken Business Principles and Marketing.

* * *

Q. Do you see any relationship at all between FBLA and those Business classes that you attend?
A. Not -- no, because FBLA, most of it has been fund raisers, at least what I have seen on FBLA, and I have never been to a Leadership Conference so I don't know if those would pertain to our classes.

Q. What type of activities are involved in the [214] curriculum of those Business classes that you are involved in?
A. Accounting is just strictly Accounting and Marketing was just learning terms of Marketing and the techniques of Marketing.

Q. I want to get back to the FBLA Club a little bit. Do you have a faculty sponsor at the club?
A. Yes, we do.

Q. Do you know what the sponsor's name is?
A. I believe her name is Mrs. Winslow.

Q. Does Mrs. Winslow attend the club meetings on a regular basis?
A. Yes, she does/

Q. And what does she do at those club meetings?
A. She just monitors them to make sure that everything goes smoothly, and the president of the club usually leads the meetings but she'll jump in, you know, when she needs to.

Q. So you characterize her as a monitor. Will you explain a little bit more about that?
A. She just sits there to make sure that, you know, there is not an uprising (laughing) of the students or something. She just sits in there and she sponsors all the -- like fund-raising, she organizes the fund-raising along with the president and the vice president and the secretary of the club.

Q. Was Mrs. Winslow ever involved in the activities [215] outside of Westside High School?
A. That -- we sell candy in the school, in the concession stand, and since she has classes she does not -- she is not always in the concession stand.

Q. So she is not there to monitor the activities that are going on while you are selling the candy?
A. Sometimes she would be in there but not a hundred percent of the time, no.

Q. Is FBLA a required class?
A. No.

Q. Is FBLA a required club?
A. No.

Q. Did you receive any extra credit or a grade in the Business classes that you attend for attending the club?
A. No, I have not.

Q. Is FBLA a voluntary student club?
A. Yes.

* * *

Q. What's your relationship with Bryan Rensing?
A. Bryan and I are good friends. We go to the Math IMC every morning and sit in there and talk and stuff.

Q. And what is the subject of those conversations?
[216] A. Many times we talk about school and we also talk about things going on in our church and things going on about this case, also.

Q. Now, you said you meet in the Math IMC. Would you explain where that is for me, please?
A. That is a study center that students can go to before school or during their open "mods" during school.

Q. And is that in a classroom in Westside?
A. It's not a classroom. It's just an area that students can go to. It's a room that students can go to to study.

Q. And that has been set aside by the faculty for you to use --
A. Yes.

Q. -- to study?
A. Yes.

Q. Tell me a little bit more about the activities that you engage in with Bryan Rensing in that classroom. Do you discuss religious topics? Do you pray? What exactly do you do?
A. We do discuss religious topics. We don't pray, but yeah, we do discuss religious topics.

Q. Do any other students attend those meetings?
A. Lisa Healy is in there.

Q. Is that all?
[217] A. Yeah, most of the time.

Q. Are you a member of any other club at Westside?
A. Welcome to Westside.

Q. What is Welcome to Westside?
A. This is a club that they call you when you're needed to take new students around the school building.

Q. You say, "they call you." Who calls you?
A. The sponsor of that club.

Q. And who is that?
A. Mrs. Ricketts.

Q. Have you ever had a meeting in a classroom with Mrs. Ricketts as part of this club?
A. No.

Q. Do you see Mrs. Ricketts at all on a regular basis?
A. No.

Q. How often has she contacted you to show new students around the school?
A. I have not been contacted at all.

Q. But you are a member of the club?
A. Yes.

Q. And that's a voluntary club?
A. Yes.

Q. Does it meet at any time in any class or any other place in Westside?
A. No.

[218] Q. How long have you been a member of that club?
A. Just this year, since the beginning of the year.

Q. In your opinion, does that particular club relate to any class that you are currently enrolled in?
A. No.

* * *

LISA ANN HEALY, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[219] Q. While you have been at Westside High School, Miss Healy, have you had an opportunity to become involved in any of the student clubs and activities that go on there?
A. Yes, I have.

Q. What clubs and activities have you become involved in?
[220] A. I was involved in International Club last year and Peer Advocates last year, and this year I am involved in Drill Squad, Student Athletic Trainer, and Welcome to Westside.

Q. Let's take the first one. You said International Club last year?
A. Yes.

Q. What did International Club do? What were the activities of International Club?
A. I wasn't a faithful member but they raised money for Homecoming and for other activities.

Q. It was just a fund-raising club?
A. Well, they supported the foreign languages.

Q. And how did they support the foreign languages?
A. Just by recognizing them.

Q. Where you in any particular foreign language at the time that you were in International Club?
A. Yes, I was.

Q. What foreign language were you taking?
A. Spanish III.

Q. As a result of being in Spanish III, were you required to be in International Club?
A. No, I wasn't.

Q. Were you required to be in International Club as a result of any other courses you were taking at Westside High School?
[221] No.

Q. I realize you didn't attend real faithfully but were there times in International Club where they would do things other than raise money? Did they have social functions?
A. Not that I know of.

Q. Did you ever attend International Club where they maybe showed a movie or a film about a foreign country?
A. No.

Q. Do you know who sponsored that particular club?
A. No, I don't.

Q. Also in your sophomore year you were a member of what other organizations?
A. Peer Advocates.

Q. What is Peer Advocates?
A. We are a buddy for a mentally retarded kid that attends Westside.

Q. Is this someone that lives in District 66?

A. No. They can live in Papillion or Ralston.

Q. Is it they are bused into or brought in to Westside High School?
A. Yes.

Q. Do you know why that is?
A. I suppose for the facilities we have.

Q. Is there a Special Education Program at Westside High School then?
[222] A. Yes, there is.

Q. And who supervises this Peer Advocates?
A. I don't know the name off the top of my head.

Q. Do you know what this individual's function might have been? What did the supervisor do?
A. She works with the mentally retarded.

Q. In Westside High School?
A. Yes.

Q. Is she the head of the Special Education Program at Westside High School?
A. I don't know.

Q. As a result of being in Peer Advocates, were you required to take any course of study at Westside High School?
A. No.

Q. Did you get a higher grade in anything at all as a result of being in Peer Advocates?

A. No, I didn't.

* * *

[223] Q. In addition to International Club and Peer Advocates in your sophomore year, were you a member of any other activities during your sophomore year?
A. Band.

Q. Tell me a little bit about Band. Was that an actual classroom organization that you were in?
A. Yes. We played musical instruments during class.

Q. What instrument did you play?
A. The flute and piccolo.

Q. Were you as part of Band required to be in practices before or after school?
A. Yes.

Q. Did you also have a period during the day that you practiced?

A. Yes.

Q. So you had a regular classroom time that you attended Band and then you also had time in the morning and afternoon [224] that you practiced?
A. Yes.

Q. Did you also perform concerts and recitals with the Band at activities and other outside-school events?
A. Yes, I did.

Q. If you did not attend those outside-school events, would that have affected your grade in the course known as Band?
A. Yes, it would have.

Q. Did you in fact get a grade in Band?
A. Yes.

Q. Was attendance taken at Band functions?
A. Yes, there was.

Q. Did that include the activities at school like assemblies, football games and the like? Was attendance taken there?
A. Yes.

* * *

[225] Q. During your junior year what activities have you participated in?
A. Welcome to Westside, Drill Squad, and Student Athletic Trainer.

Q. Tell me a little bit about your experiences in Welcome to Westside. What did you do there?
A. I haven't done anything yet. We just take kids around, new kids around, Westside to get them acquainted with the kids and the classes taken.

Q. You take new kids at Westside High School around the school, is that it?
A. Yes.

Q. And what is the purpose of taking them around the [226] school?

A. So that they will have a feel of the school.

Q. Does Welcome to Westside have a sponsor?
A. Yes. Mrs. Ricketts.

Q. And what does she do?
A. I don't know. There hasn't been any meetings of it.

Q. There haven't been any meetings of Welcome to Westside?
A. Right.

Q. Did you sign up for Welcome to Westside at the beginning of your junior year?
A. Not the very beginning. At the Club Fair Day.

Q. When did the Club Fair Day take place?
A. I don't know the exact time.

Q. Some time during the first part of the school year?
A. Yes.

Q. And what is the Club Fair Day? What happens there?
A. They recognize all the clubs that are at Westside.

Q. How do they recognize them?
A. They have little booths, telling them what they do and the activities that take place, and they have a sheet that you can sign up for the activities if you are interested.

Q. And on Fair Day are you expected to sign up for any club?

A. No.

[227] Q. Are you required to sign up for any club?
A. No.

Q. As part of being a sophomore or junior, were you directed that you had to be a member of any particular club?
A. No.

Q. And you said there was one other organization that you were a member of, I believe, this year.
A. Drill Squad and Student Athletic Trainer.

Q. What does Drill Squad do?
A. Drill Squad is a pep -- pep girls that perform at basketball and football games and support the school during their athletics.

Q. You say, "perform." You do drill type activities?
A. Yes. We dance.

Q. Dance. Okay. Is that a club that is also a voluntary club that you join?
A. Well, you have to try out for it, so, yes, it would be.

Q. You are in your junior year this year. Are you required to take Physical Education this year?
A. No.

Q. Were you required to take it last year?
A. Yes, I was.

Q. And what sort of activities did you do in Physical Education curriculum?
[228] A. I myself was unable to participate fully because I had an injured knee, but what I did do, we played softball, tennis, badminton, and we ran track.

Q. Were you required, as a result of being injured last year, to take Drill Squad this year to make up for your P.E. requirement?
A. No.

Q. Is there any relationship at all that you can see between Girls Squad and the Physical Education curriculum at Westside High School?
A. No.

Q. For that matter, is there any relationship that you can see between Welcome to Westside and any curriculum that is offered at Westside?
A. No.

Q. How about Peer Advocates?
A. No.

Q. How about International Club?
A. No.

Q. Miss Healy, you heard the testimony just a moment ago of a group that meets in the morning, a number of students that meet in the morning, I believe in the Mach MCI room or whatever. Are you one of the members that meets in that room?
A. Yes, I am.

Q. And who all meets there with you?
[229] A. Jennifer Hilt, Bryan Rensing, and once in a while Bryan's brother, Kevin Brown.

Q. And what's the purpose of the particular meeting?
A. Just to talk about our weekend and our days and what's going on on the weekends.

Q. To your knowledge, are these other individuals that you meet Christians?
A. Yes.

Q. Are you yourself a Christian?
A. Yes, I am.

Q. Where do you attend church?
A. Glad Tidings Assembly of God.

Q. How long have you attended there?
A. About nine months.

Q. Do you understand the term "fellowship"?
A. Yes, I do.

Q. What does fellowship mean to you?
A. To me it means a group of kids getting together, sharing the same beliefs or sharing their feelings with each other and able to talk with them.

Q. Do you consider what you do with Bryan Rensing and Kevin Brown and others in the Math room in the morning to be fellowship?
A. Yes, I do.

* * *

[230] Q. As far as this group that meets in the Math -- the Math Sciences Room--?
A. Mach IMC.

Q. Math IMC. As far as that group that meets in there, do you know if any of the faculty knows that you meet in there?
A. No. They see us in there but there are other kids in there, too.

Q. You have never been stopped or prevented from meeting in there?
A. No.

Q. Have you?
A. No, we haven't.

Q. Do you know whether any of the faculty members know what you're doing in there at all?
A. No.

[231] Q. I think there was one other final activity that you were involved in. Was that Athletic Trainer?
A. Yes.

Q. And what is that, Miss Healy?
A. We learn how to tape ankles and injuries of the athletes.

Q. Is that something that is an activity listed on the activity sheet or advertised, if you will, at the Club Fair at the beginning of the year?
A. Not that I know of.

Q. How did you come to participate in that activity?
A. When I injured my knee, Anton Martinez helped me recuperate and he asked me if I was interested because I was interested in going into Physical Therapy, and he just asked me if I would like to.

Q. At Westside High School are there any Physical Therapy classes, if you know?
A. Not that I know of.

* * *

[234] BY THE COURT: With regard to your Peer Advocates group, tell me a little bit more what you do.

THE WITNESS: We take the kids out on weekends [235] and get to know them and be their friends.

BY THE COURT: And when you say, "take them out," you take them out where and what do you do?

THE WITNESS: Just like you would do with a normal person, you'd take them to a movie or out to lunch or out shopping.

BY THE COURT: You go to movies and shopping and things like that?

THE WITNESS: Yes. Just --

BY THE COURT: Okay. And this is all done outside the school or do you have some duties at the school, as well?

THE WITNESS: The duties are to attend the meetings but the duties of taking the kids out are outside the school.

BY THE COURT: Where do these meetings occur?

THE WITNESS: Inside of school.

BY THE COURT: And what happens at these meetings?

THE WITNESS: We discuss the activities we are going to do. We usually do them in groups, like go to the Zoo or a group of us will just go to the movies with our peers.

BY THE COURT: With your what?

THE WITNESS: Special buddy.

BY THE COURT: With your special person?

THE WITNESS: Yeah.

BY THE COURT: And do you have any educational responsibilities with regard to your special friends?

[236] THE WITNESS: No, just to be their friend.

BY THE COURT: And held them if they need help when they first come in finding the facilities at school and things like that or is that -- does Welcome to Westside do that?

THE WITNESS: That would be Welcome to Westside.

* * *

[238] JEFFREY THOMAS RAMSELL, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[239] Q. As a result of being at Westside High School, have you become familiar with the activities, clubs, et cetera, that go on in the school?
A. Yes, I have.

Q. Have you participated in any of the activities that go on at the school?
A. Just volleyball and football.

Q. Let's talk a minute about football. Was that during your sophomore or your junior year or both?
A. Both years.

Q. Do you play on the high school team?
A. As in my sophomore year, I played on the sophomore team, and during my junior year I played on the junior varsity.

Q. Is this a regular football team that represents the high school in various athletic events around the city?
A. Yes, it is.

Q. What position did you play, Mr. Ramsell?

A. Split end, kicker. That's basically it.

Q. As a result -- withdraw the question. During your sophomore year were you required to be in Physical Education as part of the curriculum at Westside High School?
A. Yes, I was.

* * *

[240] Q. As the result of being in the P.E. curriculum at Westside High School, were you also required to be on the football team?
A. No, sir.

Q. Did you receive any extra credit or extra grade consideration during -- for your P.E. class as a result of being on the football team?
A. No, I didn't.

* * *

[241] Q. You mentioned that you also participated in a sport known as volleyball. Was that inter-mural (sic) volleyball?
A. It's more of a club organization.

Q. How did you come to know about this inter-mural (sic) volleyball?
A. Through a friend.

Q. He told you about there being a club that played volleyball?
A. Yes. It's -- it's not a school-run club, though. It's run by the girls' volleyball coach at Westside.

Q. Do you all practice volleyball?
A. Yes.

Q. Do you practice on a regular basis?
A. Not really regular but we do practice.

Q. When does the volleyball season start for you in this activity?
A. I think back in February.

Q. And when does it usually end?
A. It ends this Saturday with our last tournament.

Q. Do you practice, when you practice, at Westside High School?
A. Yes, we do.

[242] Q. And is there a sponsor there that watches you while you practice?
A. Yes.

Q. Does that sponsor also play with you?
A. No. She just coaches.

Q. She just coaches.
A. Yeah.

Q. Is the team made up of Westside High School students?
A. Almost all of them, except for one.

Q. You say there is one that is not. Who is that one?
A. Kip Howard is an eighth grader at Valley View, I think.

Q. So he is an eighth grader and he plays on the team?
A. Yes.

* * *

[243] Q. Mr. Ramsell, if such a club were offered at Westside High School would you want to become a member?
A. I don't know. It depends on the time.

Q. Do you attend a particular church in town?
A. Presbyterian Church of the Cross.

Q. Do you attend that regularly?
A. No.

Q. Are you a member of any Youth Groups or Fellowship Groups in that church?
A. Not any more.

Q. So you are not very active in the church, is that right?
A. No, I'm not.

Q. So what would help you make your decision as to whether or not to join such a [Bible Study] club if it were formed at Westside High School?
A. It solely depends on how much time I have between all the other activities I do.

Q. If you had the time, would you feel compelled to join it?
A. Not at all.

Q. You understand that it would be a voluntary club?

[244] A. Yes.

Q. If such a club were permitted at Westside High School, would you see that as the school favoring one religious belief over another?
A. Not at all.

* * *

RICHARD PAUL HUSTIG, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[245] Q. Have you ever been a member of any club at Westside High School?
A. Yes, I have.

Q. And what club is that?
A. Future Business Leaders of America, FBLA.

Q. When were you a member of that club?
[246] A. My sophomore year.

Q. That was last year.
A. Yes.

Q. What types of activities did you engage in when you were in that club?
A. We attended like fund-raisers, like for Honey Sunday or for State Leadership Conferences or National Leadership Conferences.

Q. Did you personally participate in any of those activities?
A. I participated in the fund-raisers. That's about it.

* * *

Q. Did that particular club have any teacher sponsor associated with it?
A. Yes, it did.

Q. And who was that?
A. Mrs. Winslow.

Q. Did Mrs. Winslow attend the club meetings?
A. Yes, she did.

* * *

[247] Q. Was FBLA a required club?
A. No, it isn't.

Q. So that is a voluntary student club, is that correct?
A. Yes, it is.

* * *

[248] Q. Are you aware of any Business classes that are offered at Westside High School?
A. Yes, I am.

Q. Have you ever been enrolled in any Business class?
A. Not until next year, no.

Q. When you were in FBLA, did you receive any credit in any class for attending that particular club?
A. No, I haven't.

Q. Was attendance taken at club meetings?
[249] A. No.

Q. Mr. Hustig, have you been involved in any other student activities while you have been at Westside High School?
A. Band.

Q. Tell me a little bit about Band. What does that invovle (sic)?
A. It involves "involuntary" group of people if they wanted to keep up with their instrument that they learned in their previous life, like in sixth grade, they can sign up for it. It's an elective class.

Q. So you would characterize that as a class?
A. Yes.

* * *

[250] Q. If Westside High School permitted a Bible Club to meet, would you attend?
A. Probably not.

[251] Q. And why is that?
A. I don't know. I have mixed doubts.

Q. When you say you have mixed doubts, can you explain yourself a little bit?
A. Boy, that's a tough question. I -- now, are you talking on the religious status or just on the fellowship?

Q. I am just asking you if you would attend and, if not, why not?

A. It would be like they would be restricting me in following the Christian ways or whatever.

Q. So you don't feel like you have any particular interest in a Bible Club, is that right?
A. Yes.

MR. DAUBMAN: Objection to the form of the question, Your Honor.

THE COURT: Sustained as leading.

Q. Do you have any particular interest in attending a Bible Club?
A. No, I don't.

Q. If a Bible Club were allowed to meet at Westside, would you feel compelled to attend it?
A. No.

Q. If the school offered a Bible Club like all the other clubs, would you feel that the school was favored one religion over another?
[252] A. No.

* * *

THE COURT: Mr. Hustig, just a minute. You say you belong to Future Business Leaders of America Club?

THE WITNESS: Yes.

THE COURT: Or did last year, is that right?

THE WITNESS: Yes.

THE COURT: And did this club have any goals other than selling honey to support Multiple Sclerosis that you know of?

THE WITNESS: In the State Leadership Conference, or SLC, they had competition-like things and they would try to see who could, I'd say, debate over one another. That was about it.

THE COURT: This was debate over business practices or --

THE WITNESS: That, I don't know. I never attended one.

* * *

[254] **JAMES E. FINDLEY**, called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

Q. Dr. Findley, would you state your full name?
A. James E. Findley.

Q. And where do you reside, Doctor?
A. 3110 South 104th Street.

Q. And that is in Omaha, Nebraska?
A. That's right.

Q. You currently are what? The principal at Westside High School?
[255] A. That is correct.

Q. How long have you held that particular position?
A. My third year.

* * *

[257] Q. Dr. Findley, would you please describe to the Court what your current position is and what your basic duties are in that position?
[258] A. I'm the Principal at Westside High School and in that position I have the responsibility for all the classes, activities that take place as part of the high school program.

* * *

Q. You said you are responsible for the activities that go on. In what respect are you responsible for activities that go on at Westside High School?
A. In the people assigned, that are assigned to those are responsible to me.

Q. For example, the club system at Westside High School, what is your relationship to the club activity system at Westside High School?
A. Actually, that, I work -- I have the responsibility for it overall. Mr. Huston, who is an Assistant Principal, works with club activities.

Q. So the overall daily operation of the clubs and activities at Westside High School is under the authority -- [259] under your overall authority but under the specific direction of Mr. Huston, is that correct?

A. I'd say so although we probably -- we operate on a kind of management team basis so we work together on those things.

Q. How long have you worked on the club activities program at Westside High School?
A. Worked on it?

Q. How long has it been under your authority?
A. Directly under my authority for the last three years.

Q. And prior to that time?
A. It would have been directly under the previous Principal.

* * *

[260] Q. What is Exhibit 63, Dr. Findley?
A. It's a list of student activities and clubs that we have at Westside High School.

Q. Approximately how many of those exist at Westside High School? I'm not looking for an exact figure, jsut (sic) approximately.
A. The majority of them.

Q. Pardon?
A. Most of them.

Q. No. How many exist? How many activities are there, approximately?
A. I don't know without counting. Twenty-five, 30, I suppose.

Q. Now, Dr. Findley, in your opinion are all of those clubs at Westside High School curriculum-related?

A. Yes, they are.

* * *

[262] Q. You have heard testimony yesterday and possibly today about Band and how students are required to attend Band concerts outside of school, rehearsals before and after school. Do you disagree with any of that testimony?
A. I agree with the fact that the kids have to attend some of the -- or the activities outside of school as part of their grade, yes.

Q. And if they don't attend it will affect their grade, correct?
A. It could, yes.

Q. Well, it could or it wouldn't?
A. It may not in some times. It depends on if the student, you know -- what the reason is the student would have to miss it.

Q. But unless it's a valid excused absence for some reason, to just not attend these functions outside of the school would probably result in a lower grade, wouldn't it, Dr. Findley?
A. It could.

Q. Please answer "Yes" or "No," it would or it wouldn't?
A. In the majority of situations, I think it would.

Q. The second club that is listed on there or student [263] is that of Chess Club, correct?
A. Right.

Q. That does not list in its description that it is part of the curriculum, but your testimony has been that it is, correct?
A. Yes.

* * *

Q. Is it your opinion that the Chess Club is part of the curriculum, Dr. Findley?
A. Yes.

Q. Would you please explain to the Court how Chess Club is part of the curriculum?
A. Curriculum to me includes all of our required courses, our elective courses, all the activities and clubs, activities that fall in the curriculum as part of the co-curricular part of it, and there would be a number of other things that probably could fall in there, as well, but definitely I've always thought of activities as part of our curriculum.

Q. So just the very fact that it's a club at Westside High School makes it curriculum, in your opinion, is that correct?
[264] A. The fact that it's a club grows out of mission and goals for us, and what I believe parents expect or would think appropriate to offer, yes.

Q. When you say "mission and goals," what mission or goal is fulfilled by the Chess Club at Westside High School?

A. Oh, I think there could be a number of things. First of all, I think a lot of activities are provided for young people to become involved and feel good about themselves and there's a great deal of information that indicates that kids who are really successful in school are also heavily involved in activities, so that their time is utilized and they don't have just spare time on their hands, and the majority of kids who are successful in school are involved in activities. So to just be in an activity itself, we have always felt it is important to the curriculum at Westside high School but it also allows students an opportunity to do critical thinking, logic, those kinds of things that are extensions of what we have as goals and objectives for a number of courses in what we do.

Q. Do you have a Critical Thinking class at Westside High School?
A. No, but we have critical thinking emphasized in a number of classes.

Q. Do you have a Logic class at Westside High School?
A. We have logic emphasized in Computer classes.

[265] Q. I'm not asking you where it is emphasized, Dr. Findley. I am asking you, do you have a Critical Thinking class at Westside High School?
A. No, we do not.

Q. Okay. Do you have a Logic class at Westside High School?
A. No, we do not.

Q. Do you have a Problem-Solving class at Westside High School?
A. Yes, we do.

Q. Okay. What class is that?
A. That will be new this next year for ninth-graders.

Q. I am asking if it exists now.
A. It exists in the ninth grade, not at our high school.

Q. Okay. So you don't have that in the high school either, is that right?
A. That's correct.

Q. Do you have a Chess class at Westside high school?
A. No, we do not.

Q. Okay. Does, to your knowledge, any student receive a higher grade academically or extra credit academically by reason of the fact that they are participating in Chess class?
A. No.

Q. Let's take a look at Cheerleaders, Dr. Findley. Cheerleaders, again, does not state that it is, in fact, part [266] of the regular curriculum. Is it your testimony that it is curriculum-related?
A. Yes.

Q. And what curriculum is it related to?
A. Activities and clubs.

Q. I beg your pardon?
A. Activities and clubs.

Q. You are saying that because it's an activity or a club it's curriculum-related?
A. (Nodding head affirmatively.)

Q. And what class is it related to?
A. It certainly, in terms of relationship to classes, deals with involving kids in activities for their enjoyment as well as physical activity.

Q. I want to back up there because I think you shook your head and didn't give me a complete answer. Is it your testimony that Cheerleaders is curriculum-related because it is part of the clubs and activities at Westside High School?
A. That's right.

Q. That's the reason it is?
A. It's part of the curriculum. I think the curriculum at Westside High School includes activities.

Q. Is there any class at Westside High School called Cheerleaders?
A. No, there is not.

[267] Q. Is there any grade that one obtains in any particular class, higher, lower or whatever, for being a member of Cheerleaders?
A. No.

Q. Is Cheerleaders required as part of the Physical Education program?
A. No.

Q. Do you have any of the course syllabuses or classroom syllabuses that would show that Chess and/or Cheerleading is part of the core curriculum offered at Westside High School?
A. Defined "core curriculum."

Q. Part of the classes that are offered, whether they be elective or required classes.
A. No.

Q. I just want to compare a couple more of these clubs with you. Take Choir, for example, which I believe is the third one -- the fourth one down. This, again, is stated to be offered as part of the curriculum at Westside High School.
A. Yes, it's a class.

Q. Is Choir very much the same as Band in that you are also required to attend outside activities?
A. Yes.

Q. And if you don't attend outside activities and don't have a valid excuse, would your grade be lower --
[268] A. It could be.

Q. -- probably in Choir?
A. It could be.

Q. What do you mean, "It could be," Dr. Findley?
A. I am not sure that in every instance when a student misses that activity their grade is lowered.

Q. Is there a credit given for Choir?
A. Yes.

Q. Would you assume that it would be like any other course at Westside High School, that if you miss all of the classroom periods that you wouldn't get credit for it?
A. If you missed all the classroom periods?

Q. Yeah.
A. You wouldn't get credit for it.

Q. That's right.
A. That's right.

Q. Would it be safe to assume that if you missed all of the outside activities of Choir that you probably wouldn't get credit for it or you'd get a pretty bad grade in it?
A. That's safe to assume.

Q. Page 2 of Exhibit 63, you have a club known as Interact. Will you please tell the Court how Interact is related to the curriculum at Westside High School?
A. Again, it's an activity for young people to become involved and to become socially involved with peers and to [269] build -- to build relationships, and it's also a service club and it gives kids an opportunity to become involved in a service activity where they may not -- where they may either do one of two things. It's an offshoot or it could come out of objectives we have in other classes or it might get them interested in taking a class that would provide something like that.

Q. In fact, Interact is a service club that involves itself through the Rotary, Rotary International, with outside type service activities, correct?
A. Maybe inside.

Q. Inside or outside?
A. Right.

Q. But they involve themselves in activities and they are more or less under the sponsorship, from the outside at least, of the Rotarians, correct?
A. Well, yeah. We have our own sponsor, and, yeah, we work with -- with Rotary.

Q. With the Rotarians?
A. Right.

Q. Do you get a grade in any particular class as a result of being in Interact?
A. Not to my knowledge.

Q. What course at Westside High School is Interact related to?
[270] A. Well, we have service emphasis in -- that has come out of various classes over time -- Sociology, Psychology has had service areas, those are the ones that come to mind. In fact, kids' grades have been determinative to some extent, you know, if they're willing to get involved and do a service project.

Q. That used to be required in one of the courses at Westside High School but is no longer required, correct?
A. It's an option, I think.

Q. But it's not required?
A. Not to my knowledge, it isn't.

MR. VEITH: Your Honor, may I approach the clerk?

THE COURT: Yes.

MR. VEITH: Exhibits 14 and 17.

Q. Handing you, Dr. Findley, Exhibits 14 and 17, I would ask you to examine those, please.
A. (Checking exhibits.)

Q. Dr. Findley, what is Exhibit Number 14?
A. Course Goals and Objectives for Sociology.

Q. In anywhere of those Course Goals and Objectives does it list interact as one of the requirements of the Course and Goals Objectives?
A. No, it does not.

Q. Does it require there that a student be involved in Interact?
[271] A. No, it does not.

Q. Yet your testimony, I believe, was that it relates to the Sociology course at Westside High School, correct?
A. It could, yes.

Q. Exhibit 17 is what, Dr. Findley?
A. Psychology Course Objectives.

Q. Anywhere in there does it require a student to participate in Interact?
A. No.

Q. Is Interact listed in there as one of the course goals, objectives or requirements?
A. No.

Q. Yet it was also your testimony that it could relate to Psychology, is that correct?
A. Definitely.

* * *

[272] Q. And you have church activities such as Bible Studies that maybe you have participated in?
A. Yes.

Q. Could those activities or participating in fellowship as has been defined by the students today fulfill the general objectives of Sociology or Psychology?
A. Could it fulfill that?

Q. Yes.
A. Possibly.

Q. Just as Interact could possibly, right?
A. Right.

Q. Dr. Findley, are there any classes at Westside High School that requires someone to be part of a particular activity?
A. I don't think so off the top of my head.

Q. How about Band? Doesn't that require you to be in the activity that is listed on Exhibit 63 as Band?
A. It requires you to attend those things, yes.

Q. Okay. Choir does, too, doesn't it?
A. Yes.

Q. Okay. Distributive Education, DECA, also does, correct?
A. Requires that they do what?

[273] A. (sic) Well, it says that "This organization is an extension of the Distributive Education class."
A. Right.

Q. Is DECA the same, if you will, as Band or Choir, that you have to be in the club?
A. No.

Q. Do you have to be in the Distributive Education class in order to take the club or to be in the club?
A. No.

Q. Does Math class at Westside High School, Dr. Findley, require the student to be in Math Club?
A. Does Math class or any Math class?

Q. Does any Math class at Westside High School?
A. Not that I'm aware of.

Q. Not that you know of. Does a student receive a higher grade in Math Club -- or pardon me -- Math class by reason of being in Math Club?
A. Do they receive a higher grade?

Q. Right.
A. Not for just being in the club, no.

Q. As a matter of fact, a student could be at Westside High School and not even taking any Math courses and could be a member of the Math Club, correct?
A. That's right.

Q. The same is true of the Computer Club, correct?
[274] A. That's right.

Q. You don't necessarily have to be involved in any of the Computer classes at Westside High School to be in the Computer Club, right?
A. Right.

Q. Are all of the clubs and activities at Westside High School volutary?
A. Yes.

Q. So it is true that a student at Westside High School can decide to be a member of one, two, three or however many clubs and activities they can become involved in, right?
A. That's right.

Q. They can also decide to not be a member of any of them, correct?
A. Yes.

Q. Dr. Findley, tell me, how is a club or how are clubs formed at Westside High School?
A. They can be formed by teacher request, student request, coming in and initiating them and we go from there, look at it, decide whether it meets the missions and goals, fits in

our overall mission and goals statement, and see if we can -- if we have a sponsor for it, someone who will sponsor it, and we have to make a determination at that point if we are going to have it or not. Finances enter into it. A number of things.

* * *

[276] Q. This decision-making process that you are talking about, is there a formal policy that is in writing as to how one would go about getting a club formed?
A. Not really.

Q. But it's generally the case, isn't it, that when a club is requested that at least Mr. Huston is consulted, along with yourself, to try to develop that club, is that correct?
A. That's right.

Q. And it is the school that selects the sponsor, right?
A. (Coughing) I'm sorry?

Q. It is the school that selects the sponsor?
A. Yes.

* * *

Q. Did Peer Advocates, when you were looking at it, relate to any of the required curriculum or elective curriculum [277] courses at Westside High School?
A. No.

Q. So why was it permitted to be formed?
A. Because it's another activity that would allow kids to become aware of how to work with others as service activity, something that our overall goals and mission would definitely endorse.

Q. So it was because it fell under the overall goals and mission of the school?
A. Yes.

Q. Where are those overall goals and mission found?
A. In our Board policies.

Q. Let me understand your testimony, your previous testimony, correctly, Dr. Findley. You are saying that all of the clubs are curriculum-related at Westside High School because they are either an outgrowth of a particular class or they are part of the mission and goals of the high school? Is that a fair representation of your answer?
A. I think so. I'd have to think about it. That just doesn't click with me right now.

Q. Well, let's just touch on Peer Advocates. You said that Peer Advocates was not related at all to the curriculum offered at Westside High School, right?
A. To the required and elective courses directly --

Q. Right.
[278] A. -- is what your question was.

Q. Right.
A. Right.

Q. And you stated that was true, right?
A. Right.

Q. It is not directly related to any of the required or elective courses at Westside High School?
A. It is related in the sense that we have service things that come out of Sociology, Psychology, in that same respect as other service activities would be related and --

Q. Well, take a look at Exhibit 14 and at Exhibit 17 again, Dr. Findley. Is there anything in either one of those exhibits that directs someone to take Peer Advocates or to be in Peer Advocates in order to comply with the objectives of Sociology and Psychology?
A. There is not.

Q. Is there anything in the descriptions found in Exhibits 14 and 17 that requires someone to be involved in service activities?
A. There is not.

* * *

[279] Q. And is this the Board policy that you were talking about that relates to the formation of clubs and activities at Westside High School?
A. It is.

Q. Paragraph Number 1, you notice that it says that the clubs and organizations are a vital part of the total educational program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge, and skills, is that correct?
A. That's right.

Q. Dr. Findley, from your experience as a Christian, someone who has read the Bible and been in various church organizations, is it possible for a Bible Club to develop good citizenship?
A. Yes.

Q. You would hope it would, wouldn't you?
A. Yes.

Q. Is it possible for a Bible Club to develop wholesome attitudes?
A. Yes.

[280] Q. And you would probably hope that it would, wouldn't you?
A. Yes.

Q. Does the same also hold true for good human relations?
A. Yes.

Q. And it would also help to develop knowledge and skills, wouldn't it?
A. It could.

Q. As a matter of fact, in your experience, Dr. Findley, as an English teacher or as an English student, did you ever have the opportunity to read the best seller

throughout history, the Bible, in one of your courses or use it in one of your classes?
A. I never did.

Q. How about parts of it, like the Song of Solomon as prose or poetry?
A. I don't recall that.

Q. But it could be used for that, couldn't it?
A. It could be, yes.

Q. As an English teacher and as one who has taught literature, certainly the Bible is recognized as one of the greatest pieces of literature in all of civilization, isn't it?
A. Some people recognize it that way, yes.

Q. Would you at least place it in the top ten?
A. Yes.

[281] Q. Now, Dr. Findley, when a club is asked to be formed such as Peer Advocates was, do you then seek out a sponsor of the club?
A. In that case I believe the sponsor came forward.

Q. In other words, the teacher that came with the idea became the sponsor?
A. Yes.

Q. What if the student suggested a particular club or an idea comes to you through one of the seminars that you might attend as an administrator or whatever to form a particular club at the high school, how does a sponsor then emerge?

A. We would have to see if we could find somebody who we felt was appropriate to sponsor that or was willing to sponsor it.

* * *

[282] A. Yes, and Subsurfers has always been part of our curriculum.

Q. Is there a course at Westside High School that requires someone to be a participant in Subsurfers?
A. No.

Q. Is there a course at Westside High School that requires someone to be involved in scuba diving?
A. No.

Q. Do you know of any course that offers extra credit or a higher grade to someone by reason of having been in Subsurfers?
A. I do not.

Q. In fact, Dr. Findley, there are individuals who come in from the outside and participate in the Subsurfers Club, correct?
A. I don't know that.

Q. Well, Dr. Findley, you said your authority level or the activities were under your umbrella. You are saying that you don't know that there are people from the outside that come in to one of these activities and use the school facility during the club period?
A. In Subsurfers?

Q. Yes.
A. I'm not aware of that if they do.

Q. If there has been testimony like that, would you have [283] any reason to doubt it or to dispute it?
A. I would have to check with the sponsor.

Q. So you don't know for a fact that Underwater World comes into your school, the school that you're the Principal of, and teaches diving classes to certify people --
A. Yes, I am aware of that.

Q. Oh, you are. Okay. Did you know that took place?
A. That's not how I understood your question.

Q. So you are aware that Underwater World comes into the school?
A. Right.

Q. And teaches in the school?
A. Takes a Subsurfer, works with a Subsurfer class, yes.

Q. Pardon me? You confused me there. Works with a Subsurfer class?
A. Right.

Q. Is there a curriculum class called Subsurfers?
A. I'm sorry. Activity.

Q. Okay. So they work with a Subsurfers activity, right?
A. Right.

Q. And there is no class called Subsurfers, is there?

A. That's right.

* * *

[284] Q. Dr. Findley, I am showing you Exhibit 58 and ask you to review that.
A. (Checking exhibit) Okay.

Q. Have you ever seen Exhibit 58 before?
A. I don't believe I have.

Q. Do you have any reason to doubt its authenticity?
A. Not really.

Q. If there was testimony that this was available at your high school, would you have any reason to doubt that --
A. No.

Q. -- or any evidence contrary to that?
A. No.

Q. It does indicate under Roman number V there, doesn't it, that adults can participate and receive certification for 150 bucks?
A. It does.

Q. Is Underwater World in any way connected with Westside High School?
[285] A. No.

Q. Does Underwater World pay anything to Westside High School for the benefit of using the school and collecting money from students and adults during this particular activity?
A. No.

* * *

Q. We have had testimony, Dr. Findley, that some of the sponsors are actively involved in the club and others just kind of sit back and monitor. Would you agree that that's the way it generally operates in these activities?
A. It depends on your definition of "monitor."

Q. Does not actively direct, organize the activities or run the club.
A. I would tend to disagree with that. My own interpretation of how clubs are to be run is that the sponsors would be actively involved at some point, and that may be getting kids involved to direct the club. For example, when I was sponsor of Student Government, I would go in and work with kids but I didn't go in and run the activity, but I worked with kids all of the time. I met regularly with the [286] officers of the club and maybe we met in the summertime planning activities, and so forth, but kids ran the club.

* * *

[287] Q. Tell me, do certain club sponsors receive remuneration for sponsoring a particular club?
A. Yes.

Q. Is that a direct remuneration that they receive? Is that -- in other words, is it a separate check that they receive for being involved in a particular club?
A. Some do and some don't.

Q. Well, the ones that do, tell me how that happens.
A. That's agreed upon with the -- Mr. Huston has a salary schedule and we agree if salary for them or a payment for sponsoring a club.

Q. So you and Mr. Huston sit down or just Mr. Huston sends you a list or what?
A. Basically, he has a list and we've stuck with that fairly generally, and if there's an exception to that we talk about it, but basically he does that.

Q. Is there a basis for determining how much somebody might get for sponsoring a particular club?
A. We try to be -- we try to look at time and what involvement that will require and try to be fair about that, yes.

Q. In, for example, the Chess Club, how much would the Chess Club person receive?
A. I'm sorry, I don't know off the top of my head.

Q. He does get paid, though?
[288] A. Yes.

Q. Dr. Findley, can a student initiate or start a club?
A. Yes.

Q. And how would a student do that?
A. He could contact Mr. Huston or myself, Mr. Hering, and come and talk to us about it and we would get together and talk about that and decide whether that is something that

we felt came under our mission and goals, and if it did, then we would go on and look for a sponsor.

* * *

Q. So if someone were to go to you as the Principal, would you, as part of the management team, in all probability go to see Mr. Hering and Mr. Huston?
A. Probably. I would discuss it with them.

Q. That would be the normal procedure, right?
A. Right, at some point. Yes.

Q. And that's not a written procedure, is it?
A. No.

Q. It's something that has developed over the years?
A. Right.

[289] Q. Now, what is Mr. Huston's function in this whole thing if you go to him? Does he have a function in determining whether or not the club should be formed?
A. Definitely.

Q. And what's his function?
A. Well, he's -- his opinion is the one that, you know -- it falls under his responsibility and we generally try to consult and come to agreement there and I value his opinion.

Q. Who determines if a club meets the mission or objectives of Westside High School, you or Mr. Huston, Mr. Hering?
A. Ultimately that's my responsibility but we -- we will all discuss it.

Q. But the ultimate responsibility is yours?
A. Yes.

Q. What criteria do you use, Dr. Findley, in determining whether or not it meets the mission and goals of the school?
A. I look at the Board policy.

Q. And which Board policy are you talking about? Exhibit 71?
A. Yes.

Q. Is that the only thing you use?
A. I suppose. And experience, you know. You've got a feel for things. But I look at the Board policy.

* * *

[293] Q. You do recall, don't you, during that time frame of January of February of 1985 Miss Mergens coming to you with a [294] request to form a particular club?
A. That's right, I do.

Q. An you knew that she was trying to form a Fellowship Bible Club, correct?
A. She called it a Bible Club, I believe, yes.

Q. She called it a Bible Club?
A. Yes.

Q. And when she came to talk to you, you knew that she --
A. I don't think -- let me -- let me back up. I don't think she called it a Bible Club. She said she'd like to have a group of kids get together and talk about the Bible. She never used the word "club."

Q. But it was clear to you that she wanted to do that at Westside High School, right?
A. Yes.

Q. She wanted to do it after school when other activities met?
A. After school or before school, yes.

Q. She wanted to have a place in the school to meet, right?
A. Yes.

Q. Anything else about the request that you specifically remember?
A. I don't remember whether it was the first time she came to me or the second but she indicated to me that she [295] probably -- when I indicated that we couldn't do that, she indicated to me that she probably would pursue that, and I believe in one of those two instances she mentioned that she knew you.

Q. Did you specifically tell her at the first meeting -- withdraw that question. Did you deny her request that she had made at that first meeting?

A. Initially, I thought she was asking could she get together with a group of kids and talk about the Bible, and I said I didn't have any problem with that as long as they, you know, just did it on their own, and she said to me, "No, I mean I want to have a group meet that you will officially recognize," and I said at that point I could not do that.

Q. You denied her request at that time?
A. That's right.

Q. And that's during the first meeting?
A. I believe so, yes.

Q. On what basis did you deny the request, Doctor?
A. Well, a couple of things came to mind. One is immediately our Board policy that says -- you've got it in front of you, the third paragraph of that, and I had also -- I was familiar wuith (sic) equal access and that, as I understood equal access, basically what it was saying to me was that we would have a club or there could be a group of students meeting without a sponsor, discussing whatever topics they wished to [296] discuss and in no way could I have an effect or know what was happening in that group or control the subject of the group itself, and to me that was not -- did not fit our policies and it also said to me that it would be unsponsored and it didn't fit our policies of what -- of my interpretation of what the Board, who is representing the parents, said, and that was I think they expected they have a right to send their kids

to school and expect they would know what was taking place and I could no longer do that.

Q. Dr. Findley, did you deny the request because it didn't meet Board policy?
A. I think it was a combination of things, because of equal access, my understanding of that, and Board policy.

* * *

[297] Q. You said part of the reason that you denied it was [298] because of the Board policy. What was the other reason that you denied the request, Dr. Findley?
A. My understanding of equal access entered into it and I looked at it and it said that it would be a group of students who would be unsponsored talking about philosophical, political or religious ideas, and I could see some possibility of -- of an organization being formed that would talk about, say, communism or the Ku-Klux Klan or whatever, and kids -- we would have that actively taking place in our building, and parents are sending kids to school and they could go to that and there would be no way that I could stop a student from doing that, and I thought maybe the Board policy was saying we shouldn't allow kids to do that.

Q. In other words, you had no way of monitoring the group in what was going on and unless you could do that, you weren't going to allow the group to meet?

A. I didn't have an opportunity -- we didn't have a sponsor, or we could not control the subject matter. That's correct.

Q. So you did want to control the subject matter in whatever clubs took place at Westside High School?

A. In light of our mission and goals, I felt it had to fit there and i did not feel that this did.

Q. And because of the fact that it was religious, correct?

[299] A. The fact that it appeared to me that it was advocating a religious viewpoint instead of giving a study of a religion, you know, an objective kind of study.

Q. Dr. Findley, if Miss Mergens had asked to form a Philosophy Club at Westside High School, would you have permitted that?

A. It depends on it, and if she had a sponsor and what the subject was and if they were going to objectively study various philosophies. If it was just one, to advocate a philosophy, no.

Q. Dr. Findley, does Westside High School in fact actually monitor every club and what is said and what things are discussed in those particular clubs?

A. What do you mean by "monitor?"

Q. Have someone there present all the time that hears what's going on in the club and monitors it.

A. Well, they monitor it from the point of view that they know what the activity is intended to be, and, no, there's not someone there all the time but they have an idea and they can intervene in that, if necessary.

Q. How do you for a fact know then that communism or Marxism isn't being discussed in a club when the sponsor is not there?

A. It could be but then as far as I would be concerned it would be a topic that would not be part of the club.

[300] Q. The club is different than -- it would be a topic that the club was not intended to talk about, right?

A. That's right.

Q. Different from the classroom, though, where you have a teacher present all the time to monitor the discussion and the flow of the discussion, right?

A. Right, and to make sure both sides are presented.

Q. So the club structure is different in that respect, right?

A. No. I would think it's the same. The sponsor has got a responsibility for the content and what takes place in the club or activity.

Q. But he is not always there to monitor that, right?

A. Can't always be there. Kids go out and do different things. Kids meet various times to get together and practice, for example, for Drill Squad. There is no way the sponsor

could begin to meet some of the -- some of the time lines that young people set up to get ready for things. They couldn't possibly do it.

Q. So it is your testimony then, Dr. Findley, that the sponsor then is there to monitor the speech that goes on in the club?
A. No, that's not my testimony. That person is there to make sure that club is organized and follows the organization that is pre-arranged and described to us,and I've got [301] a trust in that individual that that is done.

* * *

Q. Yeah. "The kids are talking about Communism in Chess Club. They got to talking about the Soviet Union and now they're talking about Communism. What do I do, Dr. Findley? I'm the sponsor."
A. "Make sure you present both sides of the issue."

Q. Okay. Would you tell him to keep those young people from talking about Communism, though?
A. I would not. I would say, "Make sure you present both sides of the issue."

Q. Would you get rid of the Chess Club?
A. I would not.

* * *

[302] Q. At that first meeting in your office then, did you tell her at that time that she could not have the group?
A. I was -- I think what I told her was "I am reasonably sure you cannot and I'll do some checking and get back to you."

Q. And the reason that you were reasonably sure that she could not was because of School Board policies and what [303] you perceived as religion in the schools or what?
A. Well, from what I knew about equal access and what I explained earlier about equal access.

Q. When you said earlier that it was based on School Board policy, were you referring to Exhibit 71, which is I believe School Board Policy Number Fifty-Six-Ten?
A. Yes.

Q. What specific parts of that policy did you believe that would be violated by such a club?
A. Well, two parts of it, really, one of them sort of indirectly through equal access. The third paragraph I felt it violated and then, because of my concern about equal access and what equal access said to me was that you could have unsponsored clubs, it brought in the second paragraph then.

Q. When you say what you conceived of as equal access having unsponsored clubs, had you read the Act yourself?
A. Yes.

Q. And that is what you gleaned from the Act, was that the clubs had to be unsponsored?
A. Well, I understood it that groups could meet who just asked to meet, without a sponsor, an official sanctioned -- you know, an official, recognized sponsor by the District and I didn't -- we had never done that.

Q. But there could be somebody there that was a monitor, right, who watched over the activities of the group?
[304] A. Yes.

Q. That wasn't prohibited by the Act, right?
A. No, but when I interpret a sponsor, it is somebody who in my opinion has direct responsibility for the content of what takes place in those clubs or activities.

Q. Of all that takes place in the clubs?
A. Basically, for the general gist of an activity, yes. I don't think any sponsor could have total responsibility because you never know what individuals are going to do, but I mean they've got a responsibility for the general organization and planning of a club, yes.

Q. But in most of your clubs at Westside High School the students operate the club, don't they?
A. Under the direction of the sponsor.

Q. What do you mean, "Under the direction of the sponsor"? He tells them what to do?

A. He works with those kids and how that club is going to -- the content of that club. Regardless of what, in my opinion, the kids say, that individual, from my perspective, has the responsibility for the overall organization of that club. I mean that's who I would hold responsible.

Q. When you say "the content" of the club, you mean the speech that goes on in the club?
A. No. I mean the activities and the purpose, things they're accomplishing as they put together a plan of what [305] they're going to do in that club. That's how I look at when we get a sponsor and when we discuss it with the sponsor what I would expect.

Q. Why didn't you get a sponsor for the Bible Club?
A. I was never asked.

Q. But you assign all the sponsors for the clubs, you testified to that.
A. Right.

Q. So shy didn't you offer to find a sponsor?
A. Because I was interpreting that initial request to be a group of students to meet to talk about a Christian Bible Study and that they wanted to meet on their own, and that said to me -- I couldn't do that.

Q. But you didn't make the offer to Miss Mergens to have a club with a sponsor? You didn't offer to find a sponsor for her, in other words?
A. I did not.

Q. Was there any reason why you couldn't have found a sponsor for the club?
A. I don't know at this time. I didn't -- I didn't look into that.

Q. You and Dr. Findley are the ones that sit down together -- pardon me. You and Mr. Huston are the ones that generally sit down and find sponsors for clubs, aren't you?
A. Right.

[306] Q. Unless the sponsor comes forward to say, "I want to have a new club"?
A. Right.

* * *

[306] Q. The question of sponsorship never even came up really, did it, before you denied her the right to have the group?
A. Not that I recall.

* * *

Q. And Miss Mergens informed you the group would be [307] voluntary, didn't she?
A. Yes, although I've had several conversations with Bridget throughout the year. I mean we discussed it and sometimes we'd get pretty fiery in the discussion and just talk about what it was and why I was taking my stand and she was taking hers, and on one occasion I recall talking with Bridget and she mentioned to me she thought we needed this club at Westside High School because we had non-religious kids and she wanted to be able to get to those non-religious kids.

Q. Was this before or after the initial request?
A. It was after.

Q. Now, you said you felt like it violated Paragraph 3 of Exhibit 71. How do you feel that the proposed club violated Paragraph 3 of Exhibit 71?
A. That no club or organization shall be sponsored by any political or religious organization.

Q. Did she say that this was being sponsored by Word Outreach or her church that she was going to at that time?
A. She said she had been meeting with a group in Bellevue and I thought at that time mentioned your name.

Q. Did she say they were going to sponsor the group?
A. I, at the time, was confused about that. I wasn't sure.

Q. You didn't ask her, though?
[308] A. When I asked her who was going to meet, that's what she mentioned, that she had been with a group in Bellevue and they were going to come together and there was some kids that had been meeting and they were going to meet.

Q. She did tell you, though, that the kids that were going to meet were going to be Westside High School students only, right?
A. Yes.

* * *

[309] Q. My question is when you went to see Dr. Huston, did you tell him that you had already told Miss Mergens she couldn't meet?
A. I told him that it was my opinion at that time that I didn't think they could.

Q. Did you tell him that you had told her that?
A. That I didn't think they could, yes.

* * *

[310] Q. Is there anything in the mission and goals of Westside High School in Exhibit 62 that prohibit the type of club that was being suggested by Miss Mergens?
A. This is not Westside high School but I mean it's for the District.

Q. District 66.
[311] A. Okay.

Q. Is there anything in there that prohibits the type of club being proposed by Miss Mergens?
A. (Checking exhibit) Not that I see right now,no.

Q. Okay. Dr. Findley, then isolating away the School Board policies, conceivably could the club proposed by Miss Mergens have met the missions and goals of the school?
A. My understanding of the mission and goals has always been to give both sides and in that respect I would say no -- both sides of an issue.

Q. Did she tell you that she wasn't going to allow a particular group to attend?
A. She said it was a Christian Bible Study group.

Q. Did she say she was going to prohibit any ideas from being exchanged in there?
A. No. I assumed that.

Q. You assumed that anybody that was sharing anything other than a Christian idea was going to be tossed out of the club or what?
A. No. I just assumed that they were going to talk -- when she said, "Christian Bible Study," that that was going to be a study from a Christian perspective as opposed to studying it and comparing it to other religions or whatever.

Q. So from that standpoint you felt like it violated the missions and goals of the school?
[312] A. In my understanding, the way I've looked at it, yes.

Q. Is there any specific goal in there, though, that you can point to?
A. No.

Q. Or mission?
A. I suppose but it might be, you know, critical thinking. Those kinds of things mean to me seeing both sides.

Q. I believe that you said that some of the missions and goals of the school were to develop critical thinking, right?
A. Yes.

Q. Would a Bible Club have done that?
A. Well, it wouldn't have given both sides of the issue.

Q. Would it have helped to develop critical thinking?
A. I don't know. It could.

Q. It could. Could it help people develop logic?
A. Possibly.

Q. Social skills?
A. Sure.

Q. Interaction?
A. I would hope so.

Q. Those are all things that fall within the missions and goals of the school, right?
A. Right.

Q. Tell me, Doctor Findley, does Chess Club present both [313] sides of chess and checkers?

* * *

Q. You say that -- your testimony was, I believe, that [314] when a club was asked to be formed you review School Board policies before making a decision. Did you in fact do that before you told her that you didn't think the club could meet?
A. Well, I didn't immediately right there at that first meeting. I said I would have to check into it further but I didn't think they could.

Q. Dr. Findley, isn't it true that you really denied her the right to meet because of what the content of the club was going to be., i.e., Christianity or religion from a Christian viewpoint?
A. No, that's not true.

Q. Dr. Findley, I would like to have you look, if you would please, at your Affidavit which is Exhibit 61. I believe you have it in front of you. Turn to Page 2, the bottom of the page, Number 17, and I will read: "In the event of any one or more of the student clubs or organizations are determined by the Court to be non-curriculum-related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, I would recommend to the administration and Board of Education that it consider amending policies to discontinue such student clause."

Based on that, Dr. Findley, are you saying through this Affidavit that you would do away with the club system of Westside High School just to keep a Christian Club out?
A. No, that's not what I'm saying.

[315] Q. That's what it sounds like. What are you saying?
A. I am saying that if that kind of a -- if there is a group that comes in without sponsorship where a group can meet and discuss any subject and the Board of Education and the people of the District send their kids to school expecting that they will not -- that they will have some

expectation of what takes place there, my responsibility is to do what those people or the Board has asked me to do, and that is not -- if somebody comes in that building and we have a group meeting discussing a topic that may advocate Christianity, that I cannot prevent a student of theirs where they may expect them coming into the building from walking into that meeting and yet a parent may not want that to happen, and it may not just be Christianity or a Bible Study Club. It could be Ku Klux Klan. It could be Communism or whatever, and it's my feeling that the people of the School District have a feeling -- or they expect that that will not happen when they send their kids to a public school.

We have a captive audience. We have a whole gamut of ranges of feelings and so forth. I cannot -- I cannot do that.

* * *

[316] Q. Well, you're saying in this Affidavit that you recommend to the School Board if this Court rules that there is a limited open forum in Westside High School, that you would recommend to the school to do away with the club system.

A. Because it's a much bigger issue to me than a Christian Bible Club, Doug.

Q. It is not because you are a religious bigot, Mr. Findley -- Dr. Findley?

A. No, it's not because --

MR. DAUBMAN: Objection to the form of the question, Your Honor.

THE COURT: Yes, sustained. I think it is argumentative.

* * *

Q. I believe I have covered this briefly, Dr. Findley [317] but had the school itself, the administration, at the beginning of the school year '84-85 reached a decision concerning whether or not Westside High School had a limited open forum?

A. We had discussed it in an administrators' meeting.

Q. My question was had you reached a decision?

A. In the -- I will try to explain that. In the meeting it was expressed we felt, the District felt, that we did not have a limited open forum.

* * *

[318] Q. Dr. Findley, do you say that all the school clubs at Westside High School are sponsored, is that correct?

A. Yes.

Q. What is your definition of a sponsor?

A. Someone who establishes the organization along with us or how the club is going to operate, oversees the general activities of that club and what they do.

Q. Are those sponsors all employees of Westside High School?

A. Yes. We have some coaches for maybe a J.V. team that are paid by us as a coach.

* * *

[319] Q. It is true, isn't it, Dr. Findley, that you have sponsors, as you call them, that have a whole range or a wide range of what they do? Some show up all the time. Some don't show up quite as often. Some just show up like in Subsurfers and hand out the equipment and kind of sit back and watch the young people as they are doing their activities. That's [320] true, isn't it?

A. We have a range of how -- of how they let those clubs operate, yes.

Q. So that's up to the discretion, if you will, of the club sponsor and how the club is organized and all of that?

A. Right.

Q. Some of the clubs are almost student-run, aren't they?

A. They are not student-directed. Once a sponsor has worked with them, then they will -- they run the club, but the sponsor is aware of what is taking place in these clubs.

Q. You say, "aware." He doesn't direct what their activities are. He is there and present right?

A. One of the purposes, Doug, is to --

Q. Dr. Findley, my question was he is there and he is watching what is going on but he doesn't stand up and really lead the club, does he, like a teacher?

* * *

A. I think in clubs, when you work with kids, you try to develop their skills and you let them make some mistakes or otherwise they don't learn. If he directed everything they did, kids would not learn, and so he tries to direct -- or she -- and give them direction and maybe individually and how [321] to work through situations but they do not direct every move that kids make.

* * *

Q. You understood her testimony, did you, to be that the Drama sponsor didn't really participate very much, right?

A. Right.

Q. And that is okay with you, it meets with your requirements in the school?

A. The Drama Club is a group of kids, and remember, it's social, it's also -- it does some things, we've had mimes come out of that for things, it gets kids together to talk about a common activity. They might get in there and be involved in learning about what we do in plays and it's not highly structured but it is something where they learn about drama and are associated with kids involved in drama, and it may create an interest, but I -- I don't see the

director of that club coming down there all the time and saying, "We have an organized, specific activity every minute," when kids are socializing and talking about things that they are doing. That can happen in those clubs. There is no way we could control that with high school kids because they're social beings and they are going to be talking about some other things [322] and I think we've tried to work at that with kids so we don't come in and direct everything to the absolute letter so kids can't breathe. We tried not to do that.

Q. You said they are social beings. Isn't the school of Westside High School designed in the modular structure, the club system and all of that, meant to be a forum, if you will, for the free exchange of ideas?
A. Designed to be that way? It's a public school and we have a modular schedule and we expect that kids use their time constructively.

Q. Let's talk for a minute about publications of the school. You have a list of publications that emanate out of the school, right?
A. For example?

Q. Oh, the school newspaper.
A. That comes from a class, yes.

Q. And that class is overseen by a teacher, right?
A. Yes.

Q. And the teacher, if you will, allows the students to freely express themselves in articles, correct?
A. The guidelines for that, the teacher works with them so that they do not -- and I have confidence in that individual -- so that they do not criticize or minimize opportunities of kids or other people but we try to operate by the First Amendment.

[323] Q. Do you allow them to have the First Amendment right of freedom of expression through the press?
A. Right.

Q. You don't deny that to them, do you?
A. That's right.

MR. VEITH: May I approach the witness, Your Honor?

THE COURT: You may.

Q. Look at Exhibit 78 and see if you recognize that. That is Exhibit 78 for identification.
A. (Checking exhibit) It's the last copy of The Lance.

Q. And what is The Lance?
A. It's a publication of the Journalism class of Westside.

Q. Is this one of the publications that comes out of Westside High School?
A. What do you mean, "comes out," Doug?

Q. Well, is it written by students of Westside High School, parts of it are?
A. In a class, yes.

Q. And they go and get the advertising, if there is any in there?
A. They work through the class to do that, yes.

Q. The advertising that is in there helps to pay for the printing of the paper, if you will?
A. Partly.

[324] Q. The paper is free to the students, isn't it?
A. Yes.

Q. It is available every two weeks during the school year?
A. Yes.

Q. Is the teacher directed by you, if you know, or by anyone else from the school to not allow the students to publish anything in particular?
A. I don't know what he, you know, specifically told them they can't publish.

Q. That particular copy of the newspaper, Exhibit 78 for identification, has an article in it, doesn't it, about the confiscation of some videotapes, correct?
A. It does.

Q. And that relates, doesn't it, to the incident that took place with Mr. Huston?
A. It does.

Q. And you confiscated the videotapes or had them confiscated, right?
A. I took the videotapes, yes.

Q. You directed that they be confiscated?
A. I asked Mrs. Boe to get me the videotapes, yes.

Q. And who is she, Dr. Findley?
A. She is the teacher of a Cable class, a Cable TV class.

Q. And that's a class at Westside High School that does [325] what?
A. It's probably a P.R. class as much as anything for Westside High School and kids leaning how to work in a television studio.

Q. Now, you didn't keep the young people that are in the Jornalism class or whatever from writing about your confiscation of the tapes, did you?
A. I did not, no.

Q. But at the same time you did confiscate the tapes or had them confiscated from this particular class, from the students, right?
A. I took the tapes because in the past we have shown tapes the following day in a TV showing room of rallies, and I felt the rally was inappropriate and, therefore, in no way could I defend that with parents if we showed it again. That had to be my responsibility.

Q. Isn't it true, Dr. Findley, that you took the tapes under threat of expulsion of those students that had the tapes?
A. I -- when I took the tapes, Doug, I had never thought about that yet.

Q. You never said to somebody that if the tapes didn't turn up, that they were going to be suspended?
A. That's right, I did not say that.

MR. DAUBMAN: Your Honor, I want to object to this line of questioning as irrelevant.

[326] THE COURT: I am not sure what the relevance of this is, Mr. Veith.

MR. VEITH: Your Honor, I think the relevance is that in one instance we find Dr. Findley agreeing that the students have First Amendment rights and he is going to protect them and then he turns around and he is denying them certain First Amendment rights --

THE COURT: Well, Dr. Findley isn't necessarily -- and his views are not the sole focus here. I sustain the objection. I think we have an argumentative line of questioning that doesn't prove or disprove very much as far as this lawsuit is concerned.

Q. Dr. Findley, as far as the newspaper is concerned, there is no prohibition then as to what is printed there, right, other than that it is in good taste, right?
A. That's true.

* * *

[333] Q. Dr. Findley, are you familiar with the club known as Quill and Scroll at Westside High School?
A. I am.

Q. And what is your understanding of what that club does?
A. That club primarily plans the recognition banquet for students on Year Book and in the newspaper at the end of the year, puts together the plans for that and takes care of the plaques or the sheets or whatever they get. It's a -- it's similar to National Honor Society. It's an awards -- a thing that plans an awards ceremonies for kids for work well done, things accomplished, and at that banquet they announce their editors and the photographers et cetera for the next school year. So it's kind of a recognition end-of-the-year thing that is a national organization, as well, in the Journalism area.

[334] Q. Is that, in your opinion, related to the curriculum also?
A. Yes.

Q. In what way?
A. Well, it recognizes achievement and we do that.

Q. So it is a recognition club that is related to the curriculum, from that standpoint, is that correct?
A. It kind of grows out of that class, too. It comes from that class, as well.

Q. It comes out of the Journalism class and recognizes Journalism students?
A. Right.

Q. And you talked about the National Honors Society. The National Honors Society is also, if you will, a recognition club, right?
A. It recognizes leadership, service, character and scholarship.

Q. And that has a sponsor at Westside High School?
A. Yes.

Q. It's not directly tied to any class at Westside High School, though, is it?
A. Not to any one class, no.

Q. One of the ways you get into National Honors Society, in addition to those other things is if you have a certain grade point average, correct?
[335] A. Yes.

Q. That's the only --
A. That's nationally established, yes.

Q. That's the only relationship, if you will, to grades of the curriculum, right?
A. To the curriculum?

Q. Yes.
A. Well, obviously it recognizes service and character and leadership, all of which we try to encourage in young people.

* * *

[337] Q. So in a particular case of outside groups coming in, for example, you do have the outside group that comes in from Underwater World to Subsurfers, right? --

A. Uh-huh.

Q. -- but they don't pay anything to use the facility, do they?
A. Not to my knowledge.

Q. Would there be someone that would have better knowledge than you as to whether or not Underwater World pays?
A. Mr. Huston would, probably.

Q. Can Boy Scouts use the building?
A. They have, yes.

Q. Under what restrictions? Any restrictions?
A. They've used their gyms at times, you know, if they want to come in and have an activity, to play ball or something, we let them do that.

Q. What about a church group?
A. We've not done that.

[338] Q. Has any church group, to your knowledge, ever asked to use the facilities?
A. Oh, yeah.

Q. And they have been denied the right to use the facilities?
A. They've asked to use it for religious services and so forth and we have not done that, according to the policy.

Q. Okay. When you say, "According to the policy," you are talking about according to this policy that is 54 and 55?
A. Yes.

Q. Have you ever been the one to make that determination and refused the right for a group to meet?
A. Not -- not where it was my responsibility, no.

* * *

[342] Q. Did Miss Mergens ever mention to you, Dr. Findley, that there might be someone interested in sponsoring her club?
A. She may have, yes.

Q. And did you -- who was that individual, if you remember?
A. I believe it was Rob Jahns. (phonetic)

Q. And did you ever meet with Mr. Jahns about maybe sponsoring a club?
A. No.

Q. You sponsored clubs before, haven't you, Dr. Findley?
A. Yes.

Q. And you sponsored, I believe, Student Government?
A. Right.

Q. What is that? Is that like a representative from each class who meets together to establish student policies in the school?
[343] A. Yes, it's similar to that.

Q. What class or curriculum does that relate to, Dr. Findley?
A. Well, it relates to building citizenship and understanding of the governmental process. We've got American Government class. We've got

Political Science classes. We have a number of things that would relate to that.

* * *

Q. Dr. Findley, that's the course objectives of American Government, correct?
A. Yes.

Q. Is there anywhere in there that it recommends or sets forth that Student Government is a requirement to take this course?
A. No.

Q. You are not required in that to take the course then, right?
A. No.

[344] Q. When you were the sponsor for American Government did you ever help to have someone receive extra credit in American Government because they were part --
A. No.

Q. -- of the Student Government?
A. No.

Q. So does that relate to the curriculum again under the general goals and objectives of the school?
A. I believe, and I don't recall right off the top of my head, it relates to building good citizens and I think that's mentioned more than one place, without my reading all through that.

Q. To the goals and objectives, is that right?
A. Pardon me?

Q. It relates to the goals and objectives of the school?
A. Mission and goals.

Q. I'm sorry. Mission and goals. What did this particular club do when you were the sponsor.
A. They do a number of things. They -- I believe their constitution says that they're to work at promoting or making life appropriate, school life appropriate for students or something like that, and they try to provide activities that will get kids involved in part of Westside High School. For example, they do a number of things. They have -- they might sponsor a dance that at the start of the year would get [345] kids together and get them to know one another. They provide a scholarship, a couple of scholarships, for kids from money they make each year. They have an essay, the Student Board Advisory Scholarship. They have a number of activities, for example at winter break time they have a holiday activity for parents. If they want to bring their young children in, they provide cartoons and have clowns come and those kinds of things and take care of the children in the afternoon while the parents shop.

They also deal -- allow students in various homerooms who have representatives to Forum, which is another house of the government, there are two houses, to bring forward ideas through Forum to the attention of the Student Advisory Board who works with their sponsor,

and if they have a request of the administration they do that. So they do that kind of representative work, as well.

Q. Did you ever find in Student Government that diverse political ideas were exchanged?
A. There may have been. Generally those kids don't get in heavy political discussions but they could.

Q. You never prohibited them from doing that, did you?
A. No.

Q. Did you ever insure that -- stand around to insure that the discussions were not one-sided if that happened?
A. Did I ever insure it? If I was there and present, [346] I would have expressed both sides.

* * *

Q. Did we ever talk about what a non-curriculum-related organization would be?
A. Yeah.

Q. Well, we've had discussions. I don't know if they were anything official, but we talked about many of the things I've related, that a non-curriculum-related club would be something where individuals would have an activity that would advocate something that would not give both sides of the issue, and again where parents may expect to send their kids to school and not have that option available for them if they would just walk in, without any control over the

content of what's being discussed, by the school itself. I think we -- you know, we talked about it generally.

* * *

[347] Q. Dr. Findley, are there any unsponsored student groups that meet at Westside High School?
A. No.

Q. There are not?
A. Not that I can think of.

Q. What, Dr. Findley, is Ski Club?
A. It's an activity, really. It's a one-time thing that somebody takes. It's a trip. It's a trip where they have one trip and it's really not a club. That's a misnomer.

Q. It's an activity where at least someone that is listed as a sponsor gets a group of students together to go to Colorado, right?
A. Yeah. We have a number of things throughout the year where kids go on or are requested to go on various ski trips and it takes them out of school. We provide a ski trip so that we don't have kids taken out of school so much, and it is a trip.

Q. There are meetings that are held before this ski trip?
A. Just to explain -- to explain to parents and kids what's needed, the cost and so forth.

Q. There is a sponsor assigned to it, isn't there?

[348] A. Yes, but he's really to -- really to set it up and work with parents and kids so they know it is a trip.

Q. Is the sponsor a teacher or an administrator from the school?
A. Yes.

Q. And so is this an officially sponsored trip of Westside High School?
A. It is.

Q. Is it voluntary?
A. Yes.

Q. If I understand your testimony then correctly, you are saying that this doesn't fall into the school activities?
A. It's an activity. It's not a club.

Q. It's not a club. Are there any other activities of the school that are not clubs that are sponsored by the school?
A. Oh, there are all kinds of classes and stuff. I assume you're leaving that out. But I don't think of any, Doug.

Q. The Ski Club or the ski trip is the only one you can think of?
A. That I can think of right now, yes.

Q. Aren't the kids that go on the ski trip gathering together because of their interest in skiing?
A. I would assume so.

[349] Q. That's why they go on the trip, right?

A. I assume they want to go ski, yes.

Q. And it's a trip of Westside High School students, right?
A. It could be although I don't know that they're all necessarily Westside High School students.

Q. Do you open it up to other students?
A. I don't think so. I think they're, you know -- I just don't know if we have let other kids go on that trip or not. I don't think so.

Q. Another club at Westside High School is Chess Club, right?
A. Right.

Q. Is that a voluntary club?
A. Yes.

Q. Okay. If students, for example, ceased to attend Chess Club, say the membership in Chess Club went down to maybe two students and it did that for a couple of years in succession, what would happen to the club?
A. It depends. We've probably had two or three or four or five students in it sometimes anyway and it continues to function.

Q. If that happened for a long period of time, what would happen to the club?
A. I think right now we'd continue to do it because we [350] know it kind of comes and goes with the kids that come in, interest in it.

Q. Have you had some clubs that have ceased to exist because of interest or lack thereof?
A. I'm sure we have.

Q. Can you think of any offhand?
A. Not in my time as Principal, I don't think of any. I don't think they've quit functioning. They may not -- you know, they may not have kids coming but -- I'm not aware of it.

Q. Dr. Findley, going back up to ski class of Ski Club or whatever it is, is the sponsor for that paid?
A. Only through if they set up the trip and they get the kids involved in that trip and they -- their way is paid as a part of that.

Q. You pay their expenses then?
A. Yeah, through what they collect from kids. We have had other teachers, Doug, for example, sponsor or work with an organization maybe that wouldn't be directly sponsored by Westside High School or it could be to take kids to Europe and the way they get there is they get so many kids and through a travel agency and it pays their way.

* * *

[353] Q. Dr. Findley, if someone were to come forward to form a group and would agree to sponsor a group and then say, "I don't want to be paid anything for it," would you object to that sort of thing?
A. Probably not.

* * *

[354] Q. Dr. Findley, do you believe that Westside High School is a place for controversial subjects to be discussed within the curriculum of the school and --
A. Under teacher direction, yes.

[355] Q. And so you have no problem with controversial subjects being discussed in the classroom under teacher direction or even in the clubs, right?
A. Right.

* * *

Q. Do you believe that Westside High School students are mature enough to handle controversial subjects such as abortion?
A. I believe it will vary with age, Doug.

Q. By and large, do you think the students are able to --
A. I can't answer that.

Q. -- handle that?
A. I think it will vary with age and background and I -- I have mixed emotions about when kids are ready for that and I am sure lots of people do.

Q. But it is something that is presented in the high school, isn't it?
A. Yes.

Q. In classroom situations?
A. And I believe it is presently primarily at the senior level.

Q. Things like birth control are presented in the high [356] school?
A. Uh-huh.

Q. So it wouldn't be unusual since by your definition the clubs are co-curricular, it wouldn't be unusual for the same sorts of things to be discussed in clubs too, would it?
A. We would have to look at what the clubs had asked to do and if they -- if the club was -- you know, I don't know what that would come under, but we would have to look at that in terms of mission and goals, and then again make sure that all the sides of that are presented.

Q. Well, for example, if in Drama Club the Drama Club got into a play and the play had some things about sexual preference, you wouldn't expect the sponsor of the club to stop the kids from discussing sexual preference that happened to come up during the club, would you?
A. If the instructor was there and made sure that that was presented fairly.

* * *

Q. To you knowledge, Dr. Findley, has Planned Parenthood ever been allowed to meet at Westside High School?
A. To meet?

Q. To be present at Westside High School?
A. it has come in to classrooms, yes.

Q. It comes in and makes presentations, doesn't it?

[357] A. Yes. It doesn't meet as a group in our building, no.

Q. But they are allowed to come into the classroom and make presentations on birth control?
A. After discussion with our teachers and what the purpose of the class is and so forth, yes.

Q. But they do come into the classroom?
A. Yes.

Q. Is this an elective class that they go into?
A. Yes.

Q. Do kids get a grade for being in that class?
A. Yes.

Q. Have you seen the Planned Parenthood presentation?
A. Yes.

Q. Is student attendance required for that class?
A. No.

Q. They were permitted to opt out?
A. Yes.

Q. Did they have to give a reason why they were opting out?
A. No, although I am sure the instructor says, you know, when they talk to the student, "Why are you leaving?" or "Why don't you want to be there?" rather than just saying "I don't want to come today." There's got to be some reasonable decision made there.

* * *

[358] Q. Has anyone ever presented hypnotism or Transcendental Meditation to students at Westside High School?
A. I know of --

MR. DAUBMAN: Objection, Your Honor, on the grouds of relevancy.

THE COURT: Overruled. He may answer.

A. I know of hypnotism.

Q. Having been presented in the classroom?
A. Yes.

* * *

[359] Q. What type of criteria is used in determining whether or not groups like this can come in and make a presentation at the school?
A. Usually when it's a subject that may be one where it's controversial, the teacher is expected to inform me of it and we need to talk about it and decide if we will, you know, do it, and then we also make sure we give kids an option of whether they are going to be there or not.

Q. To your knowledge, did any group ever apply for permission to come in and give a presentation and have that request be denied?
A. Not to my knowledge.

Q. Do you recall the Ku Klux Klan being denied permission to come in?

A. We had some speakers, some Ku Klux Klan speakers, come in who wanted to come in and speak and we did not let them.

Q. Did they want to come into the classroom and speak?
A. Yes.

* * *

[361] Q. The club that was set forth by Miss Mergens to you, if it were to be permitted at Westside High School, do you [362] believe that the students in general at Westisde (sic) High School would perceive that as the school's advancement of one religious belief over another?
A. It could. Some might.

Q. Do you think very many of them would?
A. I don't know.

Q. You have been an educator for a number of years, Dr. Findley. You don't think that you have an opinion as to how large a group of them would, whether it would be 10 per cent of them, 20 percent?
A. I wouldn't want to speculate on that.

Q. Do you think if the school issued a disclaimer, that that would help the students understand better?
A. It might.

* * *

Q. Dr. Findley, in your opinion would it be appropriate if a teacher at Westside High School were to wear a button to school advocating a particular sexual preference?
A. Would it be appropriate?

Q. Yes.
[363] A. No.

* * *

Q. Is there a policy that exists that sets forth what would be done?
A. I'd have to review that, Doug. I wouldn't know off the top of my head.

Q. What would you, yourself, do?

* * *

THE WITNESS: I'd ask them to remove it.

Q. If a student or a teacher were to wear an arm band to school protesting aid to the Contras, what would you do in that case?
A. I'd allow them to wear it.

Q. You would?
A. Yes.

Q. How about a button protesting nuclear energy or nuclear war?
[364] A. I'd allow them to wear it.

Q. Please distinguish for me what the difference would be between the first instance and the last two.

A. I think the one is much -- the first one is very controversial and I wouldn't be comfortable with a staff member advocating that right now without somebody -- I mean, within in front of a group of kids and nobody else there to contest that each time they saw that button. I don't think that would be fair.

* * *

Q. Do you believe that allowing a teacher to wear any of these buttons would in fact to cause the student body in general to believe that this was an endorsement by the school of that particular stand?
A. It could.

Q. It's not very likely, though, is it?
A. Well, it may be. For some kids, it very well could.

Q. How about, Dr. Findley, a button that says "Jesus is Lord," would you permit that to be worn?
A. Yes.

Q. By a teacher also?
A. I'd discuss that with them. I would discourage that.

Q. Do you have any policy that you would try to enforce?
[365] A. Similar to what we have talked about. I just don't think they should be advocating one thing without some other -- a member of the staff doing that gives an example to kids. You've got to have the other issue or the other side of that thing

presented and I think it's much different when a member of staff does it than when a student would do that.

* * *

[368] Q. Some time in one of those meetings you suggested that she use the church across the street, didn't you?
A. I suggested that she might check into that and -- and contrary to what Bridget said, if I recall it correctly, I suggested that she might use that and that we had a good relationship with the church and I would work to help them get that set up, if they wanted to.

Q. But you wanted her to initiate that request of the church, right?
A. No. I don't remember that that way. I remember it a different way.

* * *

[369] Q. Why did you suggest the church across the street?
A. I thought if there was a place nearby that they wanted to get together and it was convenient and fairly close, they could still meet.

Q. Did you have open classrooms available in the school?
A. Sure.

Q. Do you believe the policy that currently exists at Westside High School promotes the free sharing of religious ideas?
A. Which policy?

Q. Policies of the School Board.
A. That it promotes what?

Q. The free sharing of religious ideas?
A. Does it promote that? It doesn't discourage it.

Q. Do you believe that the policy of Westside High School or of the District, rather, is to not discourage the free exchange of ideas concerning any subject, like religion, politics?
A. I believe the policy is set up so that we have -- we discuss or there is a discussion of those and if both sides are presented.

Q. Dr. Findley, Westside High School has, I believe, a modular type system, is that correct?
A. Yes, that's right.

Q. What is that? What does that mean?
[370] A. It's a schedule that repeats itself every five days. Students would have classes that meet but would not necessarily meet straight across the board as in a traditional schedule so there wouldn't be Period 1 every day. It might be Period 1 on Monday and a different period on Wednesday, Thursday and Friday, or it might meet four days a week or whatever, and it allows students unscheduled time to study, to gather information, to meet with teachers to make some decisions about how they're going to study and learn. It is built on the idea that we will help develop responsibility, help develop kids to become more responsible in how they use their

time, in sort of a laboratory type situation, so that there is some supervision and there are some rules and guidelines that kids have to function under.

Q. But in general it is to develop responsibility, to allow them the freedom to possibly more about and to possibly exchange ideas?
A. Yes, and it's -- it's done so -- so that sophomores or the youngest kids coming in are more heavily structured than seniors, and we try -- we try to build in their time so they have fewer decisions to make and we make more of them for them, and the older they get the more we work with them to make those decisions.

* * *

[380] THE COURT: All right. And now specifically [381] let's go back to Interact, which I understand is a club that has some connection with Rotary International, is that right?

THE WITNESS: Yes.

THE COURT: And I noticed in one of the exhibits here it is limited to male students only, presumably because Rotary International is limited to men only?

THE WINTESS: Right.

THE COURT: Is that the rationale there?

THE WITNESS: I would think so. Z Club is girls and that's kind of a counterpart to it.

THE COURT: I see. Well, now, one of the issues here is the forum of ideas and the interchange and the interaction of ideas insofar as whether you have a limited open forum, an open forum or a closed forum, and I think we have probably wrestled that problem around extensively since you've been here, either as a witness or watching the trial. I'm not a Rotarian but I eat lunch over in the hotel once in a while and as I come out the north door there is an office there that has a Rotary creed or something up on the wall, "Is it fair," and I don't remember, there's four or five things. Now, in this Interact Club is that an idea that is promoted as part of this club with the students that participate?

THE WITNESS: I -- I don't think it's promoted to any great extent. I don't think you could find kids that [382] would know what that was.

THE COURT: Is that contained within the literature that is used by the club to the end that those ideas, which I'm not being critical of, you understand --

THE WITNESS: Right.

THE COURT: -- but I just noticed them up there, if this is a student club that is related I am curious as to whether this thrust is part of the thrust of the club?

THE WITNESS: I've never seen it if it is and I've never heard it discussed with kids.

THE COURT: And what do they do then? You said there was service -- your policy promoted service emphasis and then service projects. What did you mean by that?

THE WITNESS: That will vary. They might collect food for the Pantry or something like that and it will depend on how active those kids, working with their sponsor, and how many service projects they want to have.

THE COURT: So from that standpoint, some of these clubs at least do have "Be of service to your fellow man" and "Feed the hungry" --

THE WITNESS: Yes.

THE COURT: . -- and so forth as guiding principles, is that correct?

THE WITNESS: Yes.

THE COURT: -- and so forth as guiding principles, is that correct?

THE COURT: Well, yeah, that might be it. They might -- I don't know what other -- they've had other activities [383] that they've done, yes.

THE COURT: All right. I have no other questions.

* * *

[385] JAMES A TANGDALL, Ph.D., called as a witness by the plaintiffs, being first duly sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. VEITH:

[393] Q. Dr. Tangdall, how would you, if somebody asked you to define "club" as it is used at Westside High School, how would you define it?
A. Well, I would define a club as -- as a school organization that is made up of students that has a faculty sponsor for the purpose of promoting the -- the development of the students in that school.

* * *

Q. On that date I asked you how you defined a club and I believe your answer was, "It was any group that we would approve and assign a sponsor to, a faculty sponsor. They would meet in school under the purview of our Board policy." Do you still agree with that definition?
A. Generally I would agree with that.

* * *

[394] Q. What's the procedure of Westside High School if you know in establishing a club?
A. Well, the procedure that -- that we had or at least that I had when I was Principal is very, very similar to what Dr. Findley has already described, that if a sponsor or a student is interested in the formation of a club, they will approach Mr. Huston or myself or could apporoach (sic) another [395]

administrator about that possibility and indicate what the purpose of the club is going to be and sit down and discuss it with one of those administrators. Generally speaking, we would -- we would discuss that and make some kind of a decision whether we were going to proceed with it.

Q. This is an unwritten policy, isn't it --
A. That's --

Q. -- or procedure, rather?
A. That's correct.

Q. How one goes about forming a club?
A. That is correct.

Q. It could be teacher-initiated, couldn't it?
A. Yes, it could.

Q. It could be student-initiated?
A. Yes, it could.

Q. Could it also be a club initiated from the outside?
A. A club initiated from the outside?

Q. Somebody comes in and says to the school, contacts you or Dr. Findley or Mr. Huston and says, "I've got an interest area that I would like to have you explore at the school." Say computers, for example, if you didn't have one.
A. It's certainly possible.

Q. Do you know of any clubs that have been started that way?
A. (No response.)

[396] Q. Could a parent suggest a club and try to get one started?
A. Do you want me to back up and answer the first question? Off the top of my head I do not know of any that have been started that way but they very well could have.

Q. Could a parent start one?
A. If the parent would approach Dr. Findley or Mr. Huston or myself or a teacher and we felt that there was support and felt that it adhered to our policies, it could certainly -- that idea could certainly originate with a parent or someone outside.

Q. If one of the individuals who wanted to initiate a club came into contact, say, with the Principal or even you as Superintendent concerning the club, who would eventually authorize the formation of the club if it is found to be within the policies of Westside High School?
A. Within the policies of Westside High School or of the School District policy?

Q. Well, the School District policy.
A. Okay. The -- if they approach the high school administration and they felt that it fell within the School District policy, they certainly could initiate that club.

Q. And it would not ever reach your attention that such club had been formed?
A. Other than a notification, you know, that that's what [397] they were going to do and they had a sponsor

and that it was what the club was about. But they certainly had the authority to start that club.

Q. Are they required to notify you as the Associate Superintendent of the formation of the club?
A. Yes.

Q. Is that part of some procedure or is that just some sort of a written rule?
A. Well, it's an unwritten procedure that they would notify me of any clubs or activities that they started.

Q. Any changes like that that take place in the curriculum or co-curriculum, you have to be notified of?
A. That is correct.

Q. Is there any kind of a check list or memo or anything like that that is usually prepared in such a case?
A. No.

Q. Is there a requirement to notify you -- is the administration of the high school required to notify you if someone has asked to form a club but such a club has been denied?
A. No, there's no guideline to indicate that that has to occur.

Q. To your knowledge, has any other club been denied access to Westside High School since you have been there as either Principal or Associate Superintendent?
[398] A. As -- when I was there as Principal, we had a couple or three occasions when we denied an activity

to occur. One instance I can think of was girls' softball, which we had been approached by people who had formed girls' softball. I think we had another instance of -- of a soccer club early in the '70s, a soccer activity organization.

Q. What was the reason for the denial of the girls' softball at that time?
A. Well, it was a combination of things. One was facilities to -- practice facilities, diamonds; financial considerations. Also, the Metropolitan Conference that we participate in in inter-scholastic athletics did not sanction or did not have that support so we would not have had competition. Those are basically the reasons.

* * *

[400] Q. The requirement, as I understand it, in order for a club to be formed is that it has to meet the policies of the School Board and also needs to fall within the overall mission and goals of the school system, is that a fair statement?
A. That is correct.

Q. Another requirement would be what? Student interest?
A. Certainly. In order for the club to function, we would have to have student interest and we would need to have the interest and ability of a sponsor to sponsor the club.

Q. The school really finds the sponsor, doesn't it?

A. Well, the school approves the sponsor. Oftentimes students will suggest a sponsor for various clubs but we may or may not approve that suggestion.

* * *

[401] Q. Is there a requirement, Dr. Tangdall, that a sponsor be teaching any particular course in order to sponsor a particular club?
A. No, not necessarily. We are interested in the interest and the experience of the person for that position.

Q. So, in other words, you could conceivably have a History teacher sponsoring a language club, correct?
A. If they had a good awareness of multicultural understanding and an awareness of the Foreign Student Exchange Programs and strong interest, it's possible. We have never had that occur but I imagine it could happen.

Q. Would you define for me what a sponsor is as far as the clubs and activities are concerned at Westside High School?
A. Well, a sponsor is a person that we would employ to -- I think to plan and coordinate and direct the activities of that club.

Q. How active does a sponsor usually participate in a particular club?

A. Well, it will vary tremendously. It will vary [402] tremendously from club to club and from organization to organization, just as the student participation varies tremendously.

Q. So some sponsors may participate very actively to the extent of organizing the activities for the club and leading the activities and other might be considerably less than that?

A. Well, I think that all of them will -- will assist with the planning and the directing of the activities, but some sponsors will get directly involved from meeting to meeting and be up front in their leadership role. Others, depending again on the size of the enrollment in that club and the purpose of the club, will take a much more -- or a much less visible position and -- and if they feel that they have the right leadership and the right officers to conduct the activities, then they will take a much less visible and a much less direct role on a -- on a daily operation of the club.

Q. The whole purpose, Dr. Tangdall, of the club system is to provide an outlet for the students in varying interests here, isn't it?

A. Would you repeat that question?

Q. The real purpose of the club system at Westside High School is to provide an outlet for students in various areas of interest that they might have, right?

[403] A. Well, that's a purpose. That's not the total purpose. The real purpose -- the real purpose of the

club system at Westside High School is to promote the total development of that child within the mission and goals and objectives of our school system. And that's the purpose of the --

Q. And what are the goals and objectives that you're talking about?

A. Well, the goals and objectives are the goals and objectives that are adopted by the Board of Education and that I think are certainly available to people. I can't enumerate them off the top of my head but certainly community -- effective citizenship, development of effective citizenship and those kinds of things are part of those goals.

Q. You have a club, I believe, at Westside High School that is called Ski Club, is that correct?

A. No, that's -- I think my deposition alluded to that, also. It's a -- that is not a club per se. That is really a misnomer. It's an opportunity for kids to go on a ski trip and hopefully our purose of doing that is so that kids would miss less school, that we would organize and sponsor that trip to go at an appropriate time when kids would not be missing school, but it is a ski trip.

Q. Dr. Findley -- Dr. Tangdall, I'm sorry, do you know whether Ski Club or ski trip as you call it is something that appears in the schol Year Book?

[404] A. Oh, I'm sure if they had a ski stip that year, that it probably appeared. There are years that the ski stip never got off the ground and consequently there were no ski trips, so I don't suppose it appeared in the Year Book. Depending on the year, I'm sure that it appeared as some writeup of that particular trip.

Q. As a club?
A. In the Year Book, it's hard to say how they mentioned it.

Q. Okay. Is the Ski Club-slash-trip a school-sponsored activity?
A. Yes, it is.

Q. Is it sponsored by someone who is a teacher or an administrator within the school?
A. Yes, it is.

Q. Don't you, in fact, assign a sponsor?
A. We assign a sponsor, yes.

Q. So it is a school-sponsored activity, correct?
A. It is a school-sponsored activity.

Q. Do you allow them access to make announcements on the bulletin board and through the intercom system of the upcoming trip.
A. Yes, we do.

Q. Is it something that is open to Westside students only?
[405] Yes, it is. Only Westside students.

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* * *

[408] Q. Are there any requirements that have to be fulfilled for someone to sponsor a club? You have to be a teacher, right?
A. They -- they will be a faculty member. It could be an administrator. They basically have to -- I think I indicated this the other day, in previous testimony when we were talking [409] about sponsors, what the definition, what they did -- but they have to direct -- as far as we are concerned, their responsibilities are to direct, coordinate and plan the activities for that particular club.

Q. Depending upon what club it is, they may take a real active role and they may take to a degree a passive role, isn't that correct?
A. They will take an active role with clubs in the initial planning and working with the officers. Some clubs, depending upon the leadership, the student leadership, and the involvement and the activity of those clubs, will function with much less direction from the sponsor than others, but initially the sponsor is to take an active role in -- in directing and planning the activities for those clubs.

* * *

[410] Q. You are familiar, of course, with the club known as Interact, correct?
A. Yes, I am.

Q. You understand that's a club, if you will, to a degree associated with the Rotary Club of America, is that correct?
A. That is correct.

Q. Did you know that the students who attend Interact are encouraged to attend Rotary Club meetings on various occasions?
A. At various times throughout the year they will invite students, if they wish, to a Rotary meeting. It's not often that they attend but they have attended in the past.

Q. And the students do know that the club is associated with Rotary, correct?
A. I am sure that they probably do.

* * *

Q. Dr. Tangdall, how is Interact then associated or directly curriculum-related at Westside High School?
A. Well, Interact Club is part of our curriculum, is [411] part of the co-curricular activities and it's like I've indicated to you before, that it is certainly one of the purposes of Interact, is to develop citizenship and community involvement on the part of our students. We think that is an important aspect for the development of citizenship, and that certainly is consistent with our mission and goals of the school and certainly an extension of our Social Studies, one of the objectives and goals of our Social Studies curriculum.

MR. VEITH: Your Honor, could I retrieve an exhibit, please?

THE COURT: Yes.

MR. VEITH: Exhibit 13. May I show that to the witness, please?

THE COURT: You may.

Q. Take a look at Exhibit 13, please, Dr. Tangdall and when you've had an opportunity to examine it, if you will look back up at me?
A. (Checking exhibit). Yes.

Q. What is that particular exhibit?
A. Those are the objectives of the Social Studies 10 class at Westside.

Q. Do you see anywhere in those objectives a reference to Interact Club or Interact as being something that is in the objectives?
[412] A. Nothing specific in these objectives.

Q. It's true, too, isn't it, Dr. Tangdall, that there is no higher grades awarded to any student in Social Studies by reason of being in Interact, is there?
A. Not directly.

Q. Not even indirectly, is there, Dr. Tangdall?
A. Well, it is certainly possible because one of the ways that students in Sociology, for example, can earn extra credit is participate in a variety of community involvement activities. One of those community involvement activities could be a

similar or the same activity that kids are involved with at Interact. For example, the Dore Bingel (phonetic) Recreation Center for Adult Citizens et cetera. So if a student would participate in both, they certainly could get extra credit in Sociology as well as be in Interact, but it is certainly not always a one-to-one match.

Q. It could be another service project that they would want to do on their own outside of Interact also, correct?
A. It could be.

* * *

[413] Q. Where in writing in the policies and procedures is there anything that directly ties any of the various clubs at Westside High School to curriculum? In other words, do you know of any document that says, "Chess Club is related to Math" or anything in the Math curriculum exhibits that we have entered that says, "Math requires Chess Club," for example?
A. No, we do not have anything that gives direct one-to-one relationship. We certainly have our mission, goals and objectives -- the mission and goals of the school system and the objectives of each course -- and those objectives of the various courses and the mission and goals, obviously we have our total curriculum in place to enhance the development of those young people by participating in that total curriculum but there is not a one-

to-one objective that says Chess Club participation is required in Mathematics, if that's what you're [414] asking.

Q. There are on a few clubs, though, correct, such as you consider Choir to be, as it is listed on Exhibit 63 -- you consider that to be an extra-curricular activity or an extra activity, and it is tied directly to the curriculum, is it not?
A. Well, again I think we covered that the other day, that Choir is listed and Band are listed on that sheet that we provide to homeroom advisors so they can properly inform or advise as to what is available to students to participate in, to get involved, you know, before and after school. But Choir and Band is a class and I'm sure that every student I know at Westside would recognize that as a class and, therefore, any extension of that class or part of the requirements of that class are to participate in the Band performances and the Choir performances.

Q. And the same is true of Orchestra, correct?
A. That is correct.

Q. And DECA is also an extension of the Distributive Education class, correct?
A. DECA is an extension of the Distributive Education class but everyone in Distributive Education does not have to participate in DECA, where everyone in Choir would have to participate in the performance of the Choir.

Q. Everyone in Math doesn't have to participate in [415] Chess Club?
A. That is correct.

Q. I want to go down the list of clubs with you, Dr. Tangdall, and I would like to just ask you to briefly tell the Court what curriculum you -- besides the missions and goals, the general missions and goals of Westside High School or District 66 that you have said all the clubs, I guess, fall under those missions and goals -- I want to know what curriculum a particular club relates to. Chess Club relates to what curriculum, sir?
A. Well, I don't think I can answer that question because we define curriculum and co-curriculum as all those activities we provide in that school that contribute to those -- the goals and mission and objectives. You know, we've gone through this many, many times, but if you're wanting me to try and make a connection between Chess Club, I certainly would indicate, and I said before, that Chess Club we hope improves the problem-solving ability of kids, the critical thinking ability of students and enhances their logical approach to solving problems, which are certainly objectives of both our Math and Science Departments.

Q. How about Subsurfers?
A. Subsurfers would be a very similar premise to begin with but I would indicate that Subsurfers is certainly one of the overall goals of our Physical Education Program. It's [416] an example of our goals of our

Physical Education Program, to develop on the part of young people a lifelong activity to enhance their leisure time activity. Those are both overriding goals of our Physical Education Department as well as part of our mission.

Q. How about National Honors Society?
A. National Honors Society is directly related to all of our courses because it is a way to honor students who have succeeded academically, who have been recognized for outstanding service to the community and also have high moral character and outstanding leadership. There are four planks in the National Honors Society.

Q. How about Welcome to Westside?
A. Welcome to Westside again is tied to our objective of our Social -- well, first of all, the overall goal of our school, to develop effective citizens for society, and Welcome to Westside is a club to enhance the commitment and contribution to their fellow students.

Q. How about Zonta?
A. Zonta would be very similar to Interact. It is related to Zon International, which is the Z Club at Westside. It is a service club with similar functions as Interact and again would be an extension of our Social Studies' goals and objectives.

Q. Do you, Dr. Tangdall, know what Zonta International [417] is?

A. I'm not terribly familiar with it except I know that it is a women's international fellowship and service club, to devote service to -- to help support service activities in whatever community they're in.

Q. How about Student Advisory Board? How is that -- what curriculum at Westside is that related to?
A. Well, again, Student Advisory Board would certain -- it's a student-governing. Some schools call it Student Council. It's in place to develop citizenship on the part of our young people and to have kids participate and appreciate the democratic process, which again is an overriding mission of our school system.

Q. Setting aside the problems that may exist in your mind as far as establishment of religion in the schools, couldn't a Bible Club meet the goals and objectives of Westside High School?
A. It's possible.

Q. It could meet good citizenship goals, build morals?
A. I would certainly think that that's possible.

[418] Q. You'd hope it would, wouldn't you?
A. I would hope that it would.

* * *

Q. Dr. Tangdall, did you know that the school was permitting adults to participate from the outside in the activity known as Subsurfers?
A. Well, I -- I know that Subsurfers is sponsored by the school, assigned a sponsor, Mr. Harley Hartison, and I know that we have contracted with -- with I think it's Underwater World in the past to teach scuba diving lessons [419] to the youngsters in that club, and I think from time to time we've had faculty members, I think other students that have -- that those lessons are available to, but the students in our club have had the opportunity to take those lessons at a considerably reduced rate. At least, that's the way it was a number of years ago.

Q. But you knew adults were permitted into the school during the same time period as the club met, right?
A. That's correct but it was my assumption that they were either teacher aides or faculty members et cetera. At least, that was the extent of knowledge that I had of that.

* * *

[420] Q. Dr. Tangdall, in your period of time as a Principal at Westside High School, did you permit outside organizations to make announcements in homeroom and the like concerning activities that might be going on in and around the school?
A. Not that I recall.

Q. Was it in fact prohibited for, let's say, Fellowship of Christian Athletes to make it known that they were having a meeting on a particular date and at a particular place?
A. Yes.

Q. That was prohibited?
A. Yes.

Q. Other organizations like Planned Parenthood or groups like that were also prohibited from making those sorts of announcements that were having meetings in and around the school?
A. Only if it was in conjunction with a class.

[421] Q. What do you mean by that, Dr. Tangdall?
A. Well, you brought up Planned Parenthood. For example, our Sociology class has a marriage unit and during that time of that marriage unit I know that the Sociology team of teachers invite Planned Parenthood in to make a presentation, and if they would announce -- make an announcement through our bulletin or the P.A. system in relationship to that and it's signed off by that Sociology teacher, then we would permit that announcement to occur.

* * *

[422] Q. I will take a look a little bit with you at the situation with approving clubs. What has your involvement in the past been,

Dr. Tangdall, in approving the formation of clubs and activities at Westside High School?
A. "In the past," do you mean when I was Principal?

Q. Correct.
A. Well, when I was Principal at Westside High School, Mr. Huston, at least the last few years, and Dr. Hoyt before that, was the Assistant Principal in charge of activities, of the total activity program, which included athletics, and many times if a student or a sponsor, a faculty member, a potential sponsor, came and requested the formation of a club, they may do that through Mr. Huston or they may do that through me or one of the other Assistant Principals, and again we would make a determination as to whether or not we were going to proceed with that club based on -- on our school, if it was in compliance with our School Board policy, if we thought that we had enough interest, if we thought we had a [423] sponsor that had the expertise and ability and the interest to be a sponsor, then we would proceed, and, again, depending upon financial considerations and a number of other factors, and that's the way a lot of times it was initiated.

Q. In your time as Principal and then since that time as Superintendent or Associate Superintendent, have you ever had an opportunity, Dr. Tangdall, to determine that a

particular club was inappropriate and thereby turned down that club's request to be formed?

A. Well, I indicated Thursday that we simply had when I was Principal a couple of cases of soccer team and we also had an instance of a softball team, but since I have been Associate Superintendent the one I have been involved with is the Christian Bible Club.

Q. The soccer and the softball team, as you mentioned last week, was because, I believe, you didn't have facilities available?

A. Well, one of the reasons was facilities and another reason was the expense; the third reason was our Metropolitan Conference did not provide -- other schools did not provide those activities, we did not have enough teams to compete with, and coaching et cetera. There were a number of factors.

Q. It wasn't because they were playing softball or soccer, was it?

A. Not at all.

* * *

[424] Q. You said you did have an opportunity then in the case of Miss Mergens to make a determination that the club should not be permitted, correct?

A. I was involved with that, yes.

Q. What did you base your determination on?

A. Well, I based the determination on that it wasn't in compliance with the School Board policy.

Q. Is that the only reason that you denied the club the right to meet?

A. Well, from the standpoint that -- that the -- the stipulation of the club, that it was going to be formed under the Equal Access Act and that we felt that -- that with our definition of -- or working definition of "curriculum" that -- that our School Board policy need not be modified, and, consequently, the request for this club did not conform to that policy.

Q. When you say "the School Board policy," you are talking about 5610, I believe it is?

A. If that's the correct number, yes.

* * *

[425] Q. And based on this particular policy you made the determination that the club was inappropriate for Westside High School?

A. Well, based on a combination of things. If you are interested in the rationale for the determination -- for not accepting the club, I can go through that.

Q. I would like that, Dr. Tangdall.

A. We certainly, as Dr. Findley testified -- we had had a meeting to at least get a (sic) understanding and to discuss the Equal Access Act and recognizing that we feel very strongly that the curriculum of all the classes and clubs and activities

and athletics that are related to the school that we think contribute to the development of young people, that it is not necessary for us to modify our School Board policy and that we could continue to operate our clubs and activities as we had in the past, and so, consequently, that's the rationale that the refusal was made.

Q. It was a combination of things then, is that fair to say? I don't want to put words in your mouth.
A. Well, it certainly -- it certainly wasn't an isolation. It certainly -- you know, the bottom line was that our School Board policy was still intact, we did not modify it, and [426] therefore, this request did not conform to that policy so we denied the required.

Q. Okay. How specifically did the request not conform to the School Board policy?
A. Well, one was that -- that it was to be a student club, student-initiated club, and that it would not have a sponsor per se but only a monitor, and also that -- that it was a Christian Bible Club which was not -- which we felt -- which I think we all concluded was separation of Church and state, a violation of that principle.

Q. You do have policies, don't you, at Westside High School that deal with the freedom of speech and freedom of expression, correct?
A. Yes, we do.

* * *

Q. You didn't see the denial as being a violation of those particular policies?
A. Not at all.

Q. Why not?
A. Well, because when we talk about freedom of relig-- freedom of speech, freedom of religion, we're certainly going to allow students to -- we're not going to inhibit their [427] discussion as to what they wish to talk about and discuss et cetera. We're just not going to put a stamp of approval on a particular -- the tenets of a particular religion or a particular political philosophy et cetera. We're going to provide -- if we provide a club, it's going to be of an umbrella nature. We're going to prevent -- or present a balanced point of view.

Q. Wasn't there a way, Dr. Tangdall, that you could have issued a disclaimer and still allowed the club to meet?
A. No, I do not believe so at all. I think that the policy is very clear that -- that we will -- there will be school clubs, that we will assign a sponsor to direct the activities et cetera, as we have gone through before, of that club and that it will not be affiliated with a particular religion.

Q. Would you deny a Philosophy Club the right to meet, Dr. Tangdall?

A. A Philosophy Club? Well, I would certainly want to know a considerable number of details about that Philosophy Club before I made a decision on it.

Q. You would have to look into the club and what they were going to be doing before you would make a determination?
A. Well, I'd have to know what the request is and [428] know considerably more background about it.

Q. You would have to look at the contents of the club and make that determination, correct?
A. Not only the content, but the intent and purpose of what they wish to do.

Q. Dr. Tangdall, there has been some discussions back and forth on earlier occasions about financial assistance that the school might receive. Do you agree that Westside High School receives federal financial assistance?
A. That's correct.

* * *

Q. Showing you Exhibit 73, I ask you to review that please for a moment.
A. (Checking exhibit).

Q. Do you recognize that?
A. Yes, I do.

[429] Q. And that's the Federal Financial Assistance receipt by District 66?
A. For the year ending August 31 of '85, that's correct.

Q. And that totaled how much?
A. $860,000.00 -- $860,932.86.

Q. And some of those funds, whether it's through services or whether it's directly or passed on to Westside High School, is that correct?
A. That's correct.

Q. Dr. Tangdall, back briefly on the request made by Miss Mergens, how did you first come to the knowledge that Miss Mergens had requested a club at Westside High School?
A. Dr. Findley informed me and I can't remember whether it was a personal conference or through a telephone call. Dr. Findley first informed me.

Q. And did you take any steps as a result of him having informed you of this request?
A. Well, we visited about it and he indicated or asked me -- I indicated to him what transpired and what he said and, as I recall, he said he told Bridget that he thought that -- that that probably would not be possible but he needed to investigate it further, and when he talked to me I indicated to him, I said, "Are you sure that Bridget wants to form a Christian Bible Club per se?" and during that conversation we talked about the Equal Access Act, and he said, [430] "Yes, it is my understanding, that she wants it under the purview of the Equal Access Act," and I said, "I know that from time to time, you know, when she was a sophomore and a junior, she visited with a number of students in the school, in the cafeteria, art lab or

wherever, you know, about the Bible," and I said, "Are you sure she just doesn't want to get together with a group of kids and visit about the Bible?" -- "No," he said, "I'm quite sure she wants the school to put their stamp of approval on a Christian Bible Club," and I said, "Well," I said, "if that's the case, I'll talk to Dr. Hansen but --" -- and I reminded him of our meeting we had early in the school year about the Equal Access Act, "and confirm with Dr. Hansen that that's still our position." I did that and got back to Dr. Findley and indicated to him that our position was that it was not in compliance with School Board policy so we would not authorize that club to be formed.

Q. Did you get directly back with Miss Mergens on that particular issue?

A. I indicated -- I think Dr. Findley told me that he indicated that he would get back to -- to Bridget Mergens, and he said, "I'm sure that she is going to want to appeal it," and I said, "Well, if that's the case, let me know and I'll be glad to visit with her."

[431] Q. The determination that was made was made then by you and Dr. Findley and Dr. Hansen without the aid of any legal counsel, is that correct?

A. Well, we certainly made the ultimate -- the final decision. I think that Dr. Hansen -- every year, at the end of the -- at the close of the State Legislature and of the United States Congress we review the various Acts and laws et cetera that might impact

the public schools, and I think that Dr. Hansen somewhere in that conversation, that some time in August we had talked about the Equal Access Act, and he I think asked for an opinion from counsel, the School District's counsel, as to what the Act really meant and he, as I recall, received a letter indicating what the Act meant and some related cases, and we visited and indicated that we felt as I said before, that everything we offered at Westside or all of those things are part of our curriculum and consequently we saw no need to request the Board to modify their policy and we directed the secondary administrators to proceed as they had with previous clubs and activities. And so it is not just one isolated incident over here, that when this came up that all of a sudden I made a -- that Dr. Findley and Dr. Hansen made a decision that wasn't preceded by a lot of careful thought and consideration.

Q. In your Affidavit that was issued as part of the Preliminary Injunction Hearing, you made a statement, I [432] believe, that "Bridget C. Mergens made a formal request to me for permission to form a student religious club or organization." Was that a request in writing or are you talking about the request that came through Dr. Findley?

A. No, it was not in writing. It was a request that I had told Dr. Findley to tell Bridget that -- that if she wished to appeal his decision, that I would be glad to visit with her, and

so I came to Westside one day and visited with her in the conference room about -- about that situation.

Q. And that's where you told her that you felt that club would violate School Board policy?

A. That's correct. As I recall, the -- the -- it was not a very long conference and I just wanted to assure Bridget, because you've got to remember that I had known Bridget quite well for two years and had a number of conferences with Bridget over a number of things, and I just wanted to assure her that it had nothing to do with -- I didn't want her to take it personally or I didn't want her to think it had anything to do with her religion but that it just did not conform to our Board policy, and I think I indicated to her that -- something to that effect.

Q. And you do remember, too, don't you, during the course of the discussion that she indicated that she wanted to meet under the purview of the Equal Access Act?

A. I'm sure that we talked about the Equal Access Act, [433] and that was my understanding, that she wanted to meet under the purview of the Equal Access Act.

Q. And you also recall that the topic of sponsorship didn't really come up during that meeting, did it?

A. I don't -- no, I don't think we even went into the details of the policy. I think Bridget accepted that and we just had a nice visit.

Q. Did you take any affirmative steps, Dr. Tangdall, to try to help Miss Mergens work this club into the Equal Access Act or did you feel the Act did not apply to Westside?

A. Well, I certainly felt that the Act did not apply to Westside.

* * *

Q. Did you believe at that point in time when she came to speak with you that the club would also not fit within the goals of the high school?

A. I -- I don't even think I gave that any thought. I don't think I went that far.

Q. Miss Mergens didn't tell you the club was going to be sponsored by any particular religious organization, did she?

[434] A. No, other than the fact that she indicated that it was a Christian Bible Club that she wanted to form.

Q. I mean she didn't tell you it was going to be sponsored by the Baptist Church --

A. No, she did not.

Q. -- or the Church of God --

A. No.

Q. -- or anything like that?

A. No.

* * *

[435] Q. You viewed her request as being a request to have a club just like the other clubs that existed at Westside High School, correct?

A. No, I didn't -- I didn't view it as forming a club just like the other clubs at all. I think there is a big distinction that we spent lots of time discussing here. All of our other clubs are clubs that we provide with school endorsement and faculty sponsorship, and that was certainly different than this particular request.

Q. You do agree, don't you, Dr. Tangdall, that a Bible Club could become curriculum-related and that it could relate possibly to English Literature, correct?
A. Certainly, particularly if it were a comparable religious study or something of that nature, then that would -- it would certainly put a -- would give it a different perspective.

Q. But even if it were just a Christian Club, it could relate, if you will, to English Literature?

A. There's certainly -- in literature, American Literature or English Literature, we study the impact of religion in that particular era that they're studying.

Q. And of the Bible itself, right?
A. The Bible, other religions, et cetera.

Q. It could relate to Sociology?
[436] A. The Bible Club?

Q. Yeah.
A. It's -- it's possible that it could.

Q. It could relate to History, couldn't it?
A. Certainly it's possible.

Q. Dr. Tangdall, I believe that one of the policies of the school is to develop within its student body good citizenship, correct, as one of the goals?
A. That is correct.

Q. The Bible Club could do that, couldn't it?
A. I certainly would hope that it could.

Q. It could also develop wholesome attitudes?
A. I would think that it could, certainly.

Q. Good human relations?
A. That's certainly possible, yes.

Q. And human -- or, pardon me, knowledge and skills, correct?
A. If it were designed properly, it could, yes.

Q. And these are all the goals that are found in Exhibit 71, Policy 5610, in the beginning paragraph, correct?
A. (Checking exhibit) That's correct.

* * *

[437] Q. Dr. Tangdall, do you believe that Westside High School is a place where controversial subjects can and should be discussed?
A. Yes, I do.

Q. So do you believe that students are able to listen to controversial subjects and, as a result of listening to them, make decisions for themselves concerning those controversial subjects and issues?
A. I believe that if they are structured with the framework of -- of class and it's a high -- it's a very structured situation, I do.

Q. But you allow controversial subjects, according to your testimony, I believe, to be freely expressed within other [438] parts of the school, too, don't you?
A. Under our program, under modular scheduling, students have a certain amount of unscheduled time. During their unscheduled time they are allowed to go to various instructional centers to get help or to study particular areas. They may go to the cafeteria and just visit, certainly, during their unscheduled time, and as long as it conforms to the -- the orderly rules of that area, what they discuss is certainly up to them individually. We certainly don't -- don't try to monitor their discussion.

Q. And it's true, to a degree, that once a club is formed that the sponsor does not do that much monitoring or limiting of the discussion that might go on in the club, correct?
A. Well, no, they don't -- I think that obviously it will depend an awful lot on the club and the meeting and the purpose and the activity. Certainly, I think Cheerleaders are practicing. What discussion they have out there I

don't think the sponsor is going to monitor that at all. I think if it's a formal National Honors Society ceremony, there is going to be a monitoring of -- of what occurs.

Q. I guess what I am getting at is sponsors aren't required to be in the clubs at all times, are they?
A. To be there at all times?

Q. Right.
[439] A. They're not required to be there at all times, that's correct.

Q. In fact, they do sometimes come and go when the clubs are going on, correct?
A. Sometimes, that's correct.

Q. It depends on how structured the club is and how much they might be needed in the club, correct?
A. That's correct.

Q. Is it fair to say that sponsors have kind of a wide range of activities within the club?
A. They have a wide range of activities but they are responsible for all of them.

Q. They are ultimately responsible for that individual club, I understand that.
A. That is correct.

Q. But as far as let's say in Drama Club, if the kids -- that has been around for a long time, there is no need to do anything with forming the club, the kids are pretty well

familiar with how the club should be run, the sponsor doesn't have to be there all the time, does he?
A. Will not be there all the time.

Q. They can, in fact, meet without the sponsor even being there, correct?
A. Well, I don't think that would be our wishes, but obviously they must.

* * *

[440] Q. And that is your Affidavit, is it not?
A. That is correct.

Q. And that was submitted, I believe, almost two years ago now, in May of 1985, correct?
A. That is correct.

Q. Number 16 of that says, I believe, that "In the event any one or more of the student clubs or organizations are determined by the Court to be non-curriculum-related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, I would recommend to the Board of Education that it consider amending the policies to discontinue such student clubs or organizations," correct?
A. That is correct.

[441] Q. Would you explain why you would do that?
A. Well, I think that it would take an awful lot of deliberation on our part. The reason why I would do it is because I think the issue here is so vital to our community because I

think it is imperative that the parents of our youngsters in District 66 of high school age, that we have control and that we administer all of the activities that occur in that school, and if it were a choice between giving that up or giving up the Chess Club, for example, I would -- right now I would indicate that I would not relinquish that authority.

* * *

Q. Couldn't you solve the problem, Dr. Tangdall, by just providing a monitor to the club and allowing it to continue to meet?
A. Not in my definition of a monitor. We would have to have a sponsor. It would have to be a school-approved club and we would have to assign a sponsor to be sure that someone is responsible for the activities et cetera that occur there so that the parents and the community understand that we have the authority over all of the total curriculum, normally referred [442] to as curriculum and co-curricular.

Q. Correct me if I am wrong. So you are saying in your Affidavit that you would in fact recommend to the Board that any clubs that were non-curriculum-related as determined by this Court be done away with?
A. I said I would recommend that it consider.

Q. Okay, that they consider doing away with any clubs that might be non-curriculum-related?

A. That would certainly be a recommendation that they might consider that I would make to them, yes.

* * *

[443] Q. Dr. Tangdall, back a few questions relative to your answer on controlling on behalf of parents what goes on in school, certainly there are controversial subjects that are discussed in the school or that are handled in the school that some parents don't agree with, right?

A. I am sure that there are subjects that are discussed in the school that some parents don't agree with. That's why we have them in class and that's why we insist that it is presented with a balanced point of view and that our faculty or school does not take an advocacy position on those issues.

* * *

[444] Q. It's really impossible, isn't it, Dr. Tangdall, to control what goes on at Westside High School as far as those controversial subjects are concerned?

A. It certainly is possible for us to insist to the staff that we present a balanced point of view and do not take an advocacy position, and we're certainly going to discuss controversial issues as appropriate in classes and that's the concern that I have and that's obviously my

job as an administrator, to insist that -- that controversial issues are handled in that manner.

Q. You do allow students, however, to handle controversial subjects and take advocacy positions in the school [445] newspaper, don't you?

A. Well, yes. The school newspaper, though, is -- is certainly another issue that is protected by a whole other set of -- of laws, and the school newspaper is within the confines of -- of not being libelous, not being slanderous, not being lewd et cetera, and they can certainly express points of view in that newspaper. That is correct. But we are certainly not in a position to censor them. I am not.

* * *

CROSS EXAMINATION

BY MR. DAUBMAN:

[446] Q. Dr. Tangdall, is National Honor Society really a club at Westside High School or is it an honor to some of the students at Westside High School?

A. It's an honor to the students at Westside High School. It's very -- set up to honor those students who have done well in the four areas I mentioned.

Q. And who makes the decision as to whether or not a [447] particular student is to be honored as being part of National Honors Society?

A. There's a faculty committee that is formed to make those decision (sic) and recommendation of the Principal.

Q. You mentioned that there are four areas that are considered by this faculty committee in determining whether a particular student is to be on National Honors Society. Can you recite those, please?
A. I hope so.

Q. Okay.
A. Scholarship, character, service and leadership.

* * *

[448] Q. Is it fair to characterize Welcome to Westside as a club?
A. We've never -- we would never. I think most all people at Westside High School would not think of Welcome to Westside as a club per se but it is certainly an activity. It's a vehicle for kids to perform a service to their fellow students.

Q. Is it fair to characterize Welcome to Westside, Dr. Tangdall, as a sign-up sheet, so to speak, for students [449] who wish to volunteer --

MR. VEITH: Your Honor, I am going to object to the form of the question as being leading. It's an adverse witness and --

MR. DAUBMAN: It's Cross Examination, Your Honor.

THE COURT: Yes. Overruled. He may answer.

Q. Is is fair to characterize Welcome to Westside as a sign-up sheet, if you will, for students who wish to volunteer to take or to show transfer students around the high school when they transfer into the high school at mid term?
A. I think that's fair. They would sign up, probably, at the Activities Day, but it's -- that's a fair assessment.

Q. And when students transfer in to Westside High School during the school year, does the faculty sponsor a faculty advisor of Welcome to Westside and then proceed to contact people who are on that sign-up sheet to ask them to take the new students around and show him the high school?
A. Yes, she does.

Q. One of the items that you mentioned in terms of your concern about the requested club, if I recall your testimony correctly, related to being responsive to the parents or the people of the School District -- the parents of the School District as to what goes on at the high school and what control the high school exercises over the curriculum and the co-curricular activities through the clubs and [450] organizations, is that correct?
A. That's correct.

Q. In your consideration of the Equal Access Act in general, did you -- or were you concerned about types of clubs and organizations that would be

allowed under the Equal Access Act beyond a Bible Study or Christian Fellowship Class?

A. Yes.

Q. Could you explain to the Court what some of those concerns were?

A. Well, as I indicated earlier, an overriding concern that we have is that we are able to administer all of the activities that occur within that school, and I think that we would be very concerned if we opened that up to -- to the young neo-Nazis or the Moonies or whomever, and I don't think that our patrons of our community would -- would tolerate that.

Q. Is that one of the reasons why the School Board policy is as it is in requiring that it be the school that initiates sponsors and is basically responsible for the operation of all of the clubs?

A. Yes, it is.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

* * *

[456] Q. I believe the Social Studies 10 objectives were discussed, Exhibit 13. I just want to reiterate with you there are no other course curriculum guidelines or objectives that you know of, are there, Dr. Tangdall, that specifically state that Chess Club is part of the Math

curriculum or Interact is part of the Social Studies or Psychology curriculum?

[457] A. No. There are no -- there are no course objectives that specifically state that those clubs are part of that curriculum.

Q. There's no direct tie-in then?

A. I didn't say that. We think there's a direct tie-in, yes.

Q. Because it meets the objectives et cetera?

A. Of the course, that's correct.

* * *

THE COURT: Dr. Tangdall, I think I have a question. I thought I made a note here. You testified that from your point of view the club sponsor, who could be faculty or administrative or perhaps other employee, must direct, coordinate and plan the activities of a club. Why -- I guess I'm not sure -- why do you view the sponsor to encompass those responsibilities?

THE WITNESS: Well, we think that it's awfully important dealing with youngsters of that age that we have a faculty sponsor who can -- who understands what the goals and objectives of the club are to help those elected officers to do those functions, to plan what their activities are going to be and, if necessary, to direct them and coordinate them and we think that that's vital if we're going to accomplish the mission and goals and objectives of the school system.

[458] THE COURT: All right. Now from your testimony two areas have been mentioned particularly as being unacceptable. One is clubs involving political philosophy and the other, religious tenets, I believe were the words that you used. Is that essentially correct?

THE WITNESS: That's essentially correct, yes.

THE COURT: And you differentiate between these subjects being treated like clubs dedicated to the carrying out of the plans and goals of the school and classroom activities, is that correct?

THE WITNESS: Would you say that again?

THE COURT: I'll see if I can.

THE WITNESS: Okay.

THE COURT: I understood you to say that you are concerned about the activities of the sponsor and the stamp of approval on particular clubs and the subject matter of particular clubs because you view them as an extension of the goals and mission of the school, right?

THE WITNESS: That's correct. That's correct.

THE COURT: But you differentiate the function of a club from the contents of classroom instruction, is that right?

THE WITNESS: Differentiate from the standpoint that the instruction in the classroom we feel, and that's why I have

indicated all of the areas that we feel that we [459] deal with the high school level that are of a controversial nature, we are going to have those exist within the structure of that class. Our clubs and activities are an extension of the broader goals of those courses in developing citizenship, developing a spirit of community service and a spirit towards fellow man but the actual classroom activity we intend and design to be a very structured event to be sure that kids are -- when I say "kids," high-school age students are getting an objective point of view of whatever the issue may be.

* * *

[460] THE COURT: -- Modern History, whatever, and there is this concern that this balance that you speak of maybe doesn't always occur in the classroom because someone may advocate a specific candidate or a specific philosophy and so if the club program is dedicated to an extension of the school mission and part of the school mission is to discuss these controversial things in class and presumably on a balanced basis, but sometimes that doesn't occur, where in your mind do you separate all of that as you attempt to do this balancing act that you must have to do every day as a school administrator?

THE WITNESS: Well, we certainly make every effort to be sure that in those Civics classes or whatever that whatever that (sic) professor's political inclination has to be is not used in his teaching situation; that that's why we tried very hard, and I think our staff

does, to present a balanced point of view. Now, that doesn't mean when, you know, they're outside of school, they're certainly entitled to whatever kind of political action they wish to take. --

THE COURT: Well, I'm not saying that that happens.

THE WITNESS: Right.

THE COURT: I'm just saying what if.

THE WITNESS: What if it happens?

THE COURT: Yes.

[461] THE WITNESS: I would visit with that particular teacher and explain, you know where we are and remind him again that we are dealing with impressionable young people of high school age and what our responsibility in the public school is to the community and hope -- and I think in the few cases that I know of that we have resolved it that way. If it went beyond that point, why, then I'm not sure what I would do. I suppose I would maybe consult a legal opinion et cetera, but in the past we have been able to resolve them through conferring with the individual about it.

THE COURT: But you view that as somehow different than the teacher wearing the black arm band, which is a public statement perhaps of one kind or another against a certain armed conflict or a certain social situation, in the classroom.

THE WITNESS: Yes. I again would visit with him in the situations if they were expressing through a badge or an arm band or whatever, I would visit with him individually and again remind them of our obligation of the public school. Now, if they wanted to wear that arm band, you know, outside the school hours et cetera -- and that's the way that we would attempt to approach that.

THE COURT: But the courts have fairly consistently found some First Amendment implications in some of those activities --

THE WITNESS: I understand.

[462] THE COURT -- which is the same Amendment that is, at least in part, involved here.

THE WITNESS: But certainly with students, you know, I wouldn't object to that at all. If a faculty member, you know, we would visit about that, confer with him.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

Q. Dr. Tangdall, as far as the activities and clubs are concerned and how they are directed, formed et cetera, is there anything in writing that explains to a prospective supervisor -- or sponsor, rather, what he is supposed to do, how he is supposed to do it, how he is supposed

to put this club together, how he is supposed to maintain the club in whatever form it's going to end up?

A. No, other than -- other than our Board policy and other than the fact that presently Mr. Huston would visit with them and review previous constitutions and bylaws that that club may have drawn up. But -- and the fact that he would visit with them about their responsibility of -- of, you know, as I said before, planning, directing and coordinating the activities. But there is nothing specifically 1, 2, 3, you know, "Here is what you do; get at it."

[463] Q. I guess I'm asking, and I think you've answered it, but outside of 5610, the Exhibit 71, the School Board policy, there is no procedural methodology other than word of mouth from Mr. Huston as to how the club is to be formed, directed et cetera?

A. Other than previous constitution or bylaws that may have existed in that club or activity.

Q. And if that club did not exist before --

A. That's correct.

Q. -- there is still not a procedure that would apply for the formation --

A. Not a written procedure, that is correct.

* * *

Q. Dr. Tangdall, who makes the determination as to what is an objective view on a controversial subject?

A. Who makes that determination? That professional [464] staff member and other people, supervisory, that may evaluate them, which may be a team leader, a department head or an administrator, but generally it would be up to the professional opinion of that staff member. If there was a concern, then other people would intervene.

* * *

RECROSS EXAMINATION

BY MR. DAUBMAN:

* * *

[465] Q. I just want to ask you a couple of follow-up questions regarding the issues touched upon by His Honor. Do you have an objection to a Westside High School student club whose function would be religions of the world or comparative religions?

* * *

A. No. I do not -- I do not have an objection to that. I would certainly want to again review what the -- the purposes and -- and who the sponsor is going to be because I would want to be sure that that particular activity would be fairly well structured, but I certainly would not have an objection if you're talking about religions of the world or comparative religions, no.

Q. Would you insist that that club activity be structured so that there would be an even balance or treatment --

A. Yes, I would.

Q. -- of the subject matter just as there would be in [466] a classroom setting?

A. Yes.

* * *

THE COURT: Dr. Tangdall, your last answers are of some interest to me. If government, for instance, as a structure, which are taught through Political Science or whatever, has in time since the Constitution was adopted taken on responsibilities that overlapped with, for instance, religious institutions, how do you then avoid at least a limited open forum on these subjects when you teach or permit or advocate, if I understand your answer, those subjects and comparative religions and things like that as Mr. Daubman has raised with you?

THE WITNESS: Well, our position --

THE COURT: Where is the bright line that we follow here in these kinds of things or is there a bright line?

THE WITNESS: I don't believe there is a bright line, probably.

THE COURT: And isn't that the problem we have?

THE WITNESS: It may very well be the problem. We -- we just -- obviously, it's a decision that we would have to make and

have faith that -- if it's religions of the world or political affairs forum that we use our best judgment to be sure that -- that it is structured and the kids understand that there are -- how many facets, different ideologies [467] are presented, that we are presenting them at the best balance we can present, but we're certainly -- that's why we want it to be a school-sponsored club and we are certainly going to make that effort to do that, but we certainly don't want young people to go out of there feeling in any way that this is -- that we are in an advocacy role for a particular ideology, and it's not a bright line, I don't believe.

* * *

THE COURT: I am simply attempting to explore this whole subject and I think with the background here that you are obviously an expert in this area and have given some thought to these problems, based upon your testimony. But to go back to your comparative religions answer that Mr. Daubman asked you about, there's, at least in some of the religions that we are familiar with in this community, a group of mandates called the Ten Commandments. Certainly if I understand the verbiage of that part of those religions, there's certainly some things contained there that may overlap with some of your Social Studies teaching --

THE WITNESS: That's true.

THE COURT: And something like "Honor your father and your mother," and I suspect that that is probably not alien [468] to the mission of Westside High School.

THE WITNESS: No, it isn't.

THE COURT: So that's the -- and if the clubs are part of the means by which Westside High School carries on its mission, as are the classroom things, you have testified that you would recommend the elimination of anything if you had to delve into the area of these kinds of clubs at all, and my question I guess then is have you considered in that regard which clubs there would be and which clubs would have to be done away with, just to follow that philosophy?

THE WITNESS: Well, Your Honor, no, I haven't given that any serious thought at all. Obviously, I hoped that we wouldn't come to that, you know, point, but I guess that the reason for my statement is that I certainly think that it's more important to the people of our community that we have school clubs that are endorsed by the school and we assign a sponsor to make every effort to maintain that balance we're talking about, that that may be more important per se than a Chess Club is to us. Now, how far you extend that, I haven't thought about that.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

[469] Q. Dr. Tangdall, if I understand your testimony right, in order to make a determination, whether it's in the curriculum or in the case of clubs, as to whether it's permitted at the school, someone has to look at

the content of what is going to occur in that club and make a decision, right?

A. That would certainly be a factor, that is correct.

Q. I mean in the case of the Mergens' situation, you looked at what the content of the club was going to be, right?

A. Well, in the case of the Mergens' situation, that certainly being a religion club was a factor, but it was also a factor that it was under the Equal Access -- that she wanted the club under the Equal Access Act where we would not be allowed to appoint a sponsor and it would not be under our jurisdiction. Like I said before, there are a lot of factors but that is certainly a factor.

Q. One of the factors was you had to look at the content of the club to know that it was a Christian Club?

A. That it was a Christian Bible Study Club.

Q. Because it limited it to a Christian Club, that was one of the factors that was used in denying the club, right?

A. That was a factor, yes.

* * *

[470] **KENNETH K. HANSEN, Ph.D.**, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[472] Q. And what is your responsibility as far as the clubs and organizations that meet at different schools?

A. My responsibility is ultimately I am responsible for what happens in the high school whether it has to do with the curriculum or the clubs. The responsibilities are delegated to the Principal of the high school for the operation of the school and of the clubs and activities at the school.

Q. And you are ultimately responsible for the clubs and activities at Westside High School, as well?

A. Yes.

* * *

[473] Q. Dr. Hansen, you have before you among the exhibits [474] on the stand an exhibit marked 71.

A. (Checking exhibits.)

Q. Would you take a moment to review that and let me know when you have finished?

A. (Checking exhibit.)

Q. Do you recognize that policy, Dr. Hansen?

A. Yes.

Q. Is that the policy that you just spoke about which governs the initiation of student clubs and organizations?

A. Yes.

Q. If you will notice, in the second paragraph it says that "The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interests of the students and the school." Have you had the opportunity to propose or promulgate those types of regulations?

A. No, we've not. Not formally. Not in written form.

Q. How long has this policy been in effect at District 66?

A. I can't tell you. I think this particular policy was written in about 1973 but these have been the guidelines prior to that, as well.

Q. And you have been familiar with this policy since your term as Superintendent?

A. Yes.

[475] Q. Are there any other guidelines that are used by the Principal or any other member of Westside High School in dealing with the formation of clubs and organizations?

A. There are certain guidelines which would follow, such as regulations for school trips, sponsorship of trips, guidelines that school-sponsored clubs shall be sponsored by a certificated staff member and that kind of thing.

Q. But am I correct in understanding that there are no written guidelines that would tell Dr. Findley, in this case, how to investigate a request for a student club?
A. That's correct.

Q. How is it passed on? Just word of mouth?
A. It's been passed on by precedent and tradition and custom, is the way we've operated since I've been with the District.

Q. What has been the custom since you have been in the District?
A. The custom of the District has been to encourage school clubs and activities that will be helpful in the development of the student body in terms of helping their growth or social interaction, their service commitments and so forth.

Q. Dr. Hansen, to your knowledge has Westside High School ever permitted a political club, such as Young Republicans, to meet?
[476] A. Not as -- not specifically as Young Republicans.

Q. But they do have a Political Forum Club, do they not?
A. Yes, they had a club called Political Affairs Forum.

Q. And as a part of that forum, didn't they allow Young Republicans or Young Democrats to attend school activities?
A. Under the umbrella --

MR. DAUBMAN: Your Honor, I will object to lack of foundation as to when this club activity talks about, what time period we are talking about.

THE COURT: All right. Let's lay some foundation for the time period and so forth.

Q. Dr. Hansen, when were these clubs allowed to meet?
A. To my knowledge, the last time they met was when I was the Principal of the high school. Since then I don't recall that it has been recently. I don't believe they have recently.

Q. So you were Principal at the time?
A. When I was Principal, they had a Political Affairs Forum.

Q. Were you involved in the decision to allow the Political Affairs Forum?
A. Yes.

* * *

[482] A. We agreed that the class -- that the Bible Study activity, club, should not be allowed to meet.

Q. What was your reason for forming such a belief?
A. Really we had two reasons. One wsa we felt that the -- it was in violation of our Board policy which would require that we have a sponsor present at the -- to be present at any meetings of the organization. That would be one thing. The second thing was we were concerned about

whether or not the issue of separation of church and state was a factor here.

* * *

[484] Q. Previous to that particular Board meeting did you ever have an opportunity to look at the Equal Access Act and study it in any way?
A. Yes.

Q. When was that?
A. In the summer -- the fall, I guess, of 1984.

Q. Where did you get that opportunity?
A. I received numerous pub-- I received numerous publications that dealt with the issue to some degree, professional publications, Secondary School Principals Bulletin, The School Administrators Bulletin. The educational press was full of the -- you know, the issue of the equal access amendment at that time, as well as the popular press.

Q. Did you have a meeting of school administrators to discuss the Equal Access Act?
A. Yes. We discussed it at an administrative meeting.

Q. Do you recall who presented the issue and who presented the arguments in favor or against equal access at that meeting?
A. I think I did.
[485] Q. You personally did?
A. Uh-huh.

Q. So you presented what? Your interpretation of what the Equal Access Act was, is that correct?
A. Yes, and our Board policy, how it applied.

* * *

[486] Q. Mr. Hansen, you recall when we took your deposition at the office of your attorney?
A. Yes.

Q. And that was on the 4th day of October, 1985, isn't that correct?
A. I guess.

[487] Q. Was the following question asked and was the following answer given:

"Question: Why do you believe that it would not be appropriate?

Answer: I felt that it would be in violation of our historic policy or historic procedure not to have church-affiliated organizations meet in the school. I also felt that perhaps that was not only unconstitutional but I felt that it was inappropriate for us to have a Bible Study Club." --

Was that question asked and was that answer given?
A. Yes.

Q. And I would like to take those one at a time. You said that it was in violation of the historical procedure. What did you mean by that?

A. Well, historically in our School District we have tried to adhere to a policy of separate of church and state and tried to keep sectarianism out of the school.

Q. Have you ever heard of High Y?
A. Yes.

Q. What is High Y?
A. It was a -- there was a High Y Club at Westside High School.

Q. And when was that?
A. I believe back in the '50's.

[488] Q. What is your understanding of what High Y does?

MR. DAUBMAN: Your Honor, I am going to make the same objection as I did before as to what the forum was like in the '50's.

THE COURT: Overruled. He may answer.

Q. Isn't it a fact that High Y is associated with the YMCA?
A. Yes.

Q. And that the YMCA stands for Young Men's Christian Association?
A. Yes.

Q. But yet you testified that you had a policy, a historical policy, of keeping religion of Christianity, as it were, out of the schools, is that correct?
A. Correct.

Q. Did you allow High Y to meet at Westside?

A. We did at that time but then it was later not permitted to meet as a club because of affiliation with -- or presumed affiliation with being a Young Men's Christian Association and requiring a prayer and so on at the meetings.

Q. Do you recall approximately how long that was allowed to meet?
A. I don't recall. I know it met in 19 -- the late '50's.

* * *

[489] Q. You testified that you were also concerned that Bridget's request not be honored because it was a religiously affiliated club, is that correct?
A. That's correct.

Q. Why did you feel that that was a violation of school policy?
A. Because I thought it was a recommendation or a recognition or an endorsement of a specific -- of a particular religious group.

* * *

Q. I would like to refer you back to Exhibit 71. You said that you felt that it violated the school policy. Would you pont to the paragraph that you felt that Bridget's request violated, under school policy?
A. I'd say -- this is Paragraph 3.

Q. Would you read that for me, please?
A. "Such clubs shall not be sponsored by any political or religious organization or by any organization

which denies membership in the basis of race, color, creed, sex or political belief."

Q. Did Miss Mergens ever indicate to you that the request -- strike that. Did Miss Mergens ever indicate to you [490] that the club was sponsored by an outside organization?
A. I did not talk to Miss Mergens.

Q. Did Dr. Findley or Dr. Tangdall at all indicate to you that she had requested that a club meet and that that club be sponsored by an outside organization?
A. No.

Q. Did they indicate to you at all that that club would deny membership on a basis of race?
A. No.

Q. Color?
A. Not that I know of.

Q. Creed?
A. Not that I know of.

Q. Sex or political belief?
A. No.

Q. Dr. Hansen, what portion of School Policy 5610, Exhibit 71, did you feel that Bridget's request violated?
A. I would say this is not the only policy we have relating to separation of church and state. I think we have other policies that indicate that we don't advocate or support any particular religious group.

[491] Q. And what part of Exhibit 59 did you feel was being violated by Miss Mergens' request?
A. 6180.

Q. And what part of the policy?
A. Section -- or Paragraph 2.

Q. Would you read that paragraph for me, please?
A. "No teaching within the school shall be sectarian in nature. If any school program is or instruction is in any way imposing upon a student's religious beliefs, such a student may be excused from participation."

Q. Now, when Dr. Tangdall and Dr. Findley talked to you about the request, did they at any time indicate that Miss Mergens had requested that religion be taught within the [492] school?
A. No, except that Bible Study would be a form of teaching about religion in the school.

Q. Did they indicate to you that this was a voluntary student group?
A. Yes.

Q. And that it had requested permission to meet on the same basis as all the other clubs at Westside?
A. Yes.

Q. Did they indicate to you in any way that they felt Miss Mergens would be imposing upon a student's religious beliefs?
A. No.

Q. Did they indicate in any way that they felt that Miss Mergens would require attendance in some way at the religious club?
A. No.

Q. So you are testifying -- and I want to get this straight and I don't want to put words in your mouth -- but you are testifying that it was your interpretation of this policy?
A. Yes.

* * *

[495] Q. Had you ever before in any of your positions in District 66 or as a Principal denied the right for a club to meet?
A. I don't recall as a Principal. I hadn't as a Superintendent.

Q. You had not as a Superintendent?
A. No.

Q. This was the first one that you recommended be not allowed to meet, is that correct?
A. This is the first one that ever came before the Board.

* * *

[496] Q. Dr. Hansen, have you ever personally sponsored a club?
A. Yes, I believe I have.

Q. Was it at Westside High School?
A. Uh-huh.

Q. And what position did you hold at the time you sponsored the club?
A. I was Principal. I believe I was a sponsor for the Student Council for years.

Q. What types of activities did the Student Council engage in?
A. Oh, I guess the usual kinds of activities, supervising class elections, fund-raising, and involving activities for the general good of the school, a liaison between the students and faculty.

[497] Q. Was that particular Club related to any class that was offered at that time?
A. It was not part of any class.

Q. Did the students who attended that club receive any credit or grade as a result of their attendance?
A. No.

Q. Was it a voluntary club?
A. Yes.

Q. What kind of topics were discussed during club meetings in that club?
A. I suppose everything from dances to student conduct. I don't -- I really don't recall.

Q. Were topics such as the involvement of different political parties or were politics discussed?
A. No.

Q. Or any social issues of the time?
A. I don't believe so. I believe mainly issues having to do with the government of the school, internally.

Q. You kept a pretty tight rein then on the discussions in the club?
A. Generally. In those days, we still could.

Q. So it was your responsibility -- did you feel it was your responsibility to make sure that conversations were in keeping with Board policy at that time?
A. I don't recall that I was concerned about Board policy [498] at that time.

* * *

Q. Do you know whether any outside speakers are ever brought in to any student clubs that currently meet at Westside High School?
[499] A. Yes.

Q. What clubs are those?
A. Future Business Leaders of America are one I know.

Q. And what kind of outside speakers are brought in for that club?
A. Businessmen who teach about business and give a perspective to the students from the business community to relate to their school work and activities.

* * *

[501] **RONALD F. HUSTON**, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[502] Q. And that is as an Assistant Principal, is taht correct?
A. That's correct.

Q. Basically what are your duties at Westside High School as an Assistant Principal?
A. Major portion of my time is spent with the operation and direction and financing, so forth, of the Athletic and Activity Program.

Q. As the Activities -- you are the Activities Director, is that correct?
A. Yes.

Q. Does that include what are known as student activities that appear, I believe, on Exhibit 63 that you should have in front of you?
A. Yes.

Q. Does that include other activities of the school, too?
A. It could.

Q. What sort of other activities could that include?
A. The -- well, in terms of student activities?

Q. Correct.
A. No, I think this would encompass the majority of them.

Q. What do your duties entail as the Activities Director? What do you do in reference to these student activities?
A. Well, I help with the direction and organization. [503] Let's split that -- let's split that down, if we can, if that would help both of us maybe.

Q. Sure.
A. The athletic portion -- we have 19 sports that I administer in terms of scheduling and financing and directing coaches in terms of those activities. That's basically that aspect of the program.

The rest of the activities, similar kinds of responsibilities with them but obviously a different direction or approach with them, depending upon what the activity would be.

Q. Well, let's take the activity of Interact.
A. Okay.

Q. What's your relationship to Interact?
A. Well, I'm -- I'm the Assistant Principal responsible for that activity. If we were in need of a sponsor, I would get involved with -- with helping in the selection of that. I did that at the point in time we needed the current sponsor, to help develop the format for that sponsor and those youngsters who choose to be a part of it, to make some decisions about what directions they may go in terms of that activity, but also give the sponsor and the youngsters who are chosen as

the major force in the club, usually the president and vice-president, the latitude to make some of their own decisions. That's why we have student activities, I think, is to allow [504] students to make decisions under the guidance of -- of adult sponsorship.

Q. Some of the sponsors at Westside High School are paid and some of them are unpaid, is that correct?
A. Yeah, that's a generalization. Let me piggyback on so that we get a better picture of it. Most all sponsors who actually have an active organization that they are sponsoring would get some type of remuneration. There have been times when clubs didn't fly even though we had advertized they were a part of what we were doing. If we didn't have enough students there, we had a sponsor available, but it didn't work out for one reason or another, they would reject getting paid for it. So does that help you?

Q. Sure. When you say "getting paid," there are some that are paid out of an Activity Program?
A. Sure.

Q. Correct? Or an Activities fund?
A. There's a fund through the District Office that -- that in conjunction with the Associate Superintendent in charge of Personnel and I would use that fund to help remunerate sponsors. Some sponsors are paid through the actual pay process for their total salary.

* * *

[505] Q. You certainly wouldn't turn down somebody if they said they didn't want to be paid, right?
A. I -- that sounds -- yeah, that's a fair question, I guess, although I really think that if they're doing their job, that they probably should accept remuneration. I have in [506] the past asked them to take salary when they have chosen not to.

* * *

[507] Q. Other procedures?
A. Yeah. If there is somebody who wants to start an organization or club, is that what you're asking?

Q. Right.
A. Typically a student, more often than a sponsor, would come and ask if they could start Blank Club or organization or activity, and again that's a matter of semantics, I think, as to what you view the question. I would typically ask them, you know, "What do you -- do you have other youngsters that are interested? Do you have anybody in mind to sponsor it?" That's not always easy to find. "What are your goals and objectives?" and they may not know that initially. That's not uncommon and expected. But then from there, I would expect them, as a non-written policy initially, to generate something in writing, indicating what their goals and objectives for that organization would be, what they think they can accomplish, and I would probably sit

down and meet then with the potential sponsor and the potential advocate for that particular organization and see whether or not it fits under our -- our guidelines and our Board policy.

If I would have questions about that, I would probably seek other help in making that decision. Sometimes that's not necessary. It becomes obvious, I think, when it's asked. At other times it's not quite so obvious. So that would be the procedure.

[508] Q. You said, "guidelines and our Board policies."
A. Uh-huh.

Q. What policy are you talking about? 5610?
A. I should have that memorized by now, shouldn't I? (Checking exhibits) Yes.

* * *

[509] Q. Are there any guidelines that exist that you operate under that tell how a club should be formed?
A. I think I just explained that.

Q. That has been passed on to you by word of mouth, correct?
A. Well, yeah, I think I explained to you what I do when somebody comes and asks for the creation of a club.

Q. I understand that, Mr. Huston, but I am saying that procedure is not written down, is it?
A. Uh, no, it isn't.

Q. It is something that over the years has developed through the club system, right?
A. That's true.

* * *

[511] Q. For example, have you permitted the FCA, the Fellowship of Christian Athletes, to come in and use the facilities?
A. There have been youngsters who have been members of FCA that have come in when our gymnasium has been open and have used it at the same time others were using it.

Q. You have allowed the Boy Scouts to come in and use the facilities, too?
A. Yes.

Q. As a matter of fact, they had a regular swimming class or at least they used it for swimming on a regular basis, weekly basis, for a while, didn't they?
A. A number of years ago.

Q. Did they have a sponsor?
A. Did they? Yes.

* * *

[514] Q. Mr. Huston, it is true, isn't it, in the majority of the cases when somebody wants to form a club they come to you or they refer to you, right?
A. In most cases, that's true.

Q. That is the proper procedure, right?
A. It's a procedure.

Q. Okay. And in this particular instance, that didn't take place, did it?
A. No, it didn't.

[515] Q. In fact, Dr. Findley, when he talked to you, indicated to you pretty much what his decision was going to be, right?
A. He indicated that he was going to ask some people and base, I think, his final decision or the School District's decision on -- on that basis. And again I -- you know, I would concur with that since -- and if I had a request for a club that in my opinion was contrary to Board policy, I obviously, because of my responsibility to the School District, would need to confer with others. Dr. Findley is the Principal of the high school. He ultimately has a decision as to what happens at Westside High School.

Q. We're mixing words here a little bit. I want to know what you did, not what you would have done, okay? You said you would have. My question to you is did you have any input at all into the decision-making process denied this club?
A. No, not --

Q. You were bypassed?
A. Well, I agree we're mixing words, I'm not sure who's mixing them. I was alerted to the fact that it was -- there was a process that was being followed. Whether or not I was

involved initially with the requiest or being kept abreast of what was occurring, again we have to take a look at the time frames. So I think I am responding as best I can to that. I'm not trying to skirt the issue, but I think I'm being as [516] forward with you as I can about that.

Q. Do you recall again during the deposition testifying that you did not give any input into the decision-making process?
A. I understand that I was not involved when he talked with -- with -- with Dr. Tangdall or Dr. Hansen. I was not involved with that.

* * *

[517] Q. So it is your impression that all of the clubs at Westside High School are curriculum-related, is that it?
A. They are, yes, sir.

Q. And what do you base that on?
A. Our curriculum guidelines, the guidelines of our activities, and the relationship between the two through our goals and objectives for both our academics and our -- and our activity programs, co-curricular programs.

Q. But beyond those goals and objectives there is no tie-in, for example, with Sociology or Psychology with interact, [518] is there?
A. What do you mean by "tie-in"?

Q. Beyond the general goals and objectives, you don't know of any requirement of Sociology or Psychology or Social Studies that one be in Interact?
A. No, they don't have to be in Interact or in Sociology to be in the other.

Q. They really don't have to be in any club, do they?
A. No.

Q. I mean there is no requirement that a student participate in any club at all at Westside High School, correct?
A. That's true.

Q. They're all volunteer.
A. Yes.

Q. In fact, you have students that don't participate in any club?
A. That's correct.

Q. Dr. Huston, the club system at Westside High School is based to a large degree on the interest of the students, correct?
A. Yes.

Q. There have been clubs over the years, for example what was it, the W Club or whatever that you sponsored that died for lack of interest, right?
[519] A. That's true.

Q. And over the years that you have been the Assistant Principal and Director of Activities there have been clubs that have come and gone?
A. That's true.

Q. And the primary reason for that is based on student interest, right?
A. Primary.

Q. And you say that a Christian Club, you would not have approved a Christian Club as you understand Miss Mergens' request, based on the fact that it was one particular religion or denomination, is that correct?
A. Yes, I think it -- the request, I wouldn't grant it if it were solely my decision based on our Board policy that denies that to be formed.

Q. Does the Board policy, in your opinion, also cover the advertising and dissemination of, if you will, material that goes along with one particular denomination or belief?
A. I'm not sure to what you are referring.

Q. For example, would it be your opinion that Board policy would prohibit the school from posting posters concerning one particular religious function?
A. I think that -- that it would prohibit that. Again, there's really a fine line there. I think we, you know, would have to go beyond just posting something but I, typically, [520] would not -- not permit that because I -- it doesn't cover all the bases, yeah.

Q. Do you recall just recently, Dr. Huston, allowing Miss Lisa Healy to post a poster for an evangelist by the name of Rich Wilderson within the school --
A. Yeah.

Q. -- advertising his presence at the local church?
A. Yeah, I remember that. I signed off on that. It wasn't in conflict with anything else we had in terms of going on in -- in school and it wasn't denominational, at least from what I could indicate.

Q. You knew it was being held at a Christian church?
A. Yes.

Q. And you knew he was a Christian evangelist?
A. I don't recall the word "Christian evangelist" being indicated in the flyer. It may have been.

Q. But you did allow her to post that in the school, right?
A. That, I did.

Q. Dr. Huston, as part of your work as an administrator and as head of the activities, do you have an opportunity to visit the various clubs and organizations on different occasions?
A. Yes.

Q. Do you observe what goes on in these clubs?
[521] A. Yes.

Q. Most of the clubs are interest clubs that deal in whatever they are entitled., For example, Chess Club deals in chess, right?
A. Yes.

Q. And I believe I asked you this in the deposition, just because the school has a Chess Club but not a Checkers Club is not an indication to you that the school favors chess over checkers, is it?
A. I think I kind of laughed when you asked that question.

Q. It is not, though, is it?
A. No, it isn't.

Q. And you don't think the students would perceive that, do you, as favoritism towards chess over checkers?
A. No, nor have we had anybody ask for a Checkers Club.

Q. Knowing what you know about the clubs and organizations that exist at Westside High School, is it your opinion that those clubs would develop good citizenship?
A. Yes, I believe that.

Q. Wholesome attitudes?
A. Yes.

Q. Good human relations?
A. Yes.

Q. Probably would promote knowledge and skill, too, wouldn't it?
A. I would think so.

Q. Okay. Bible Club could do that, too, couldn't it?
A. Yes, it could.

Q. Have you ever had anybody approach you, Dr. Huston, to play a -- to form a games club that might play the game known as Dungeons and Dragons?
A. Yes.

Q. And what was the response to that request?
A. I procrastinated the decision immediately about it, thought about it, talked about it with others, and -- and formally indicated to the individual that requested it that based on the sensitivity of that whole thing at that time, which was -- and the time frame I am not sure of, three or four years ago perhaps, with the negative kinds of commentary that was out in the newspaper et cetera and some of the things that had happened to youngsters playing it, it didn't seem appropriate, so it was not permitted.

Q. Was that because you told them, "No," or because you procrastinated to the point where they didn't really push it?
A. I told them, "No."

Q. On visiting various clubs and all, have you ever had the opportunity to visit the club known as Interact?
A. Yes.

Q. And you know that is related to the Rotary Club [523] International?
A. They -- yes, they underwrite that club, uh-huh.

Q. When you say "underwrite," what do you mean by that?

A. Interact -- Rotary indicates that they support Interact.

Q. Do they financially support it?
A. No, sir. They may some places. Certainly not in our building.

Q. I beg your pardon.
A. They don't in our building.

Q. Okay. Do they encourage students to attend Rotary Club meetings?
A. No.

Q. Have you ever known students attending Rotary Club meetings --
A. Yes.

Q. -- as a result of Interact?
A. As a result of being asked to attend, yes.

Q. And they are asked by Rotary Club members, right?
A. Yes.

Q. And on occasion Rotary Club members come into the club and discuss Rotary, correct?
A. They may. I haven't seen them very often, but they -- that has been requested.

Q. I am going to go over a few clubs with you briefly. [524] There is no requirement in any of the curriculum that you know of for someone to be a member of Subsurfers, is there?
A. No.

Q. And you don't get a grade in P.E. for being in Subsurfers, do you?
A. No.

Q. Does the same hold true for Welcome to Westside Club? There is no curriculum there that it is directly tied to, is there?

A. No, it's not an extension of any single course offering.

Q. And you don't get a grade or extra credit for being in Welcome to Westside, do you?
A. No.

Q. The same is true of Zonta?
A. That's true.

Q. Student Advisory Board?
A. That's true.

Q. And Student Forum?
A. That's right.

Q. Mr. Huston, do you have Exhibit 56 in front of you?
A. Well, let me search around.

Q. It would be a single page.
A. Fifty-six?

Q. Correct. It's a single page with a list of club [525] names and amounts.
A. (Checking exhibits) No, I don't.

* * *

[526] Q. And in those particular instances, students that are in the Bank class are required to participate in the Bank or Choir activity, correct?
A. On most instances -- in most cases, that's true. There are some exceptions to that.

Q. Okay. But in most cases that needs to be done in [527] order to get a grade in the class, correct.
A. That's built in. Students understand that that's built into the curriculum. We talked about that in the Student Handbook. We talk about that in the Student Activity Listing.

Q. As being an extension of a class?
A. So that they understand that there is more time to be spent than just time during the regular school day. That's why we express it in a couple of different places.

Q. Various clubs at Westside High School do on various occasions have outside speakers come in, don't they?
A. Yes.

Q. And you attend those clubs when the outside speaker comes in?
A. Sometimes.

Q. Do you all the time?
A. No.

Q. Do you insure when you do attend that both sides of a particular issue might be discussed if an issue is controversial?
A. Typically, sponsors if they are going to have someone come in would probably visit with me about that if they felt that was a concern or if I thought that it might be a concern, so it's -- it's talked about perhaps before the fact rather than after the individual would already be there.

[528] Q. If it's controversial?
A. Yes.

Q. Mr. Huston, do you believe that students at Westside High School are mature enough to handle controversial issues such as abortion, sexual preference and the like?
A. As long as it's monitored appropriately and -- and -- and all sides of issues are -- are presented, I think so. Again, when you group all students together, it makes it difficult to answer that question.

Q. It does occur in the classroom that those sorts of subjects are discussed pretty freely, right?
A. Yes.

Q. And you don't know what really occurs in the different clubs because you don't attend all of them, right?
A. (No response.)

Q. In other words, that type of a discussion could happen in a club?
A. I would not know if I was not in attendance what occurred that particular day, that's true.

Q. In your opinion, Dr. Huston -- a few final questions here -- do you believe that a student is permitted to freely express at Westside High School his or her religious beliefs or affiliations?
A. Do they have an oportunity (sic) to do that? Inside class or outside class? I'm not -- I'm not --

[529] Q. In the school in general?
A. In school I think they have opportunities to do that, yes.

Q. Do you believe they have the right and freedom to pray before their meals in the cafeteria, for example?
A. I think so if -- again, it is all tied to whether or not it is disruptive or whatever, if it creates a scene, but individual kinds of prayer prior to a meal, I'm sure it may happen and I may not be aware of that.

Q. You would not have any objection to that?
A. No, sir.

Q. How about a group of youngsters gathering in the lunchroom on a regular basis to maybe share their faith with one another?
A. That might happen now and I would not be opposed to that, again, with the same directive of -- you know, if it is not disruptive, if it is not causing a turmoil or a problem for anyone.

Q. As long as it is not disruptive?
A. Yes.

Q. How about if a group were to meet in the commons area during a free period and gather together and sit around in a circle and freely discuss religious topics, and maybe even have a Bible out and have somebody there, you know, sharing something from the Bible. Would you think that was [530] permitted at Westside High School?

A. The area called the commons doesn't exist any more so can I move that to the cafeteria --

Q. Sure.
A. -- because that has kind of taken on the same tone and environment?

Q. Sure.
A. And I think, you know, I answered that in the deposition. I think we would need to take a look at that. I think we would -- this was during the school day, it's not discussion where everybody could be involved with it, it would depend on the setting and the whole situation. I just -- it's difficult for me to say "Yes" or "No" to that because I don't think that's a "Yes" or "No" question. It depends on the situation. I don't know what Bible you are talking about, though that should not make any difference.

Q. Do you recall in the deposition that I asked you the question, I said:

"Question: The same situation, if they were to meet in the commons area during a free period and gathered together and sit around in a circle and freely discuss religious topics, maybe even have a Bible out and have somebody there, you know, sharing something from the Bible?"

and your answer was:

"Answer: I would probably recommend to the Principal [531] that we wouldn't permit it. He would have to make a decision as to whether or not we would.

Question: And what grounds would you recommend to the Principal that he not permit it?

Answer: I don't think it's probably appropriate for us as public school, non-sectarian, to permit that." --

Do you remember that question and answer?

A. Yes, I do.

* * *

CROSS EXAMINATION

BY MR. DAUBMAN:

* * *

[532] Q. As part of your duties as head of the activities and so forth of Westside High School, do you undertake an ongoing monitoring and supervision of the clubs and their activities?

A. Yes.

Q. Does that, in fact, vary from club to club?

A. Yes.

Q. Could you describe for the Court generally the monitoring activities that you undertake in regard to the clubs?

A. Sure. And, again, some require or ask for or by the nature of the club, I would be more involved with it than others and more involved with the sponsor than others, but typically in all cases where we have an assigned certified staff person or classified

staff person involved with the supervision or sponsorship of that, we would talk about that. We would talk about what they thought their goals and objectives would be for that particular activity. They would talk to me about the student leadership that's involved with that, for example, if they have a president and vice president and treasurer, whatever, and what they have established as goals, based on the general content of that particular activity as it has grown through the years, and during the year then we would formally talk perhaps or informally talk for sure, depending again on what the questions may be or what [533] the concerns may be or my position wondering what was occurring et cetera. So there's a -- there's a lot of room there for -- for me to be involved, but regardless of what it is, I get involved with it to some degree.

Q. And those are part of your responsibilities in your administrative position at the high school?

A. Yes.

Q. You also testified in response to Mr. Veith's questions that some kids who happened to be members of the Fellowship of Christian Athletes did come up and use the gymnasium, is that correct?

A. Yes.

Q. When did that occur, if you recall, how long ago?

A. Well, at least two winters ago. It was during the winter season. They were looking for a place to -- to just play basketball, I think.

Q. On occasion does Westside High School open up its gym for general use by the community?
A. Yes.

Q. And did that occur after school hours?
A. Yes, it was not on a school day.

Q. Was it on a weekend?
A. It was on a Saturday.

Q. All right. And was the gymnasium open to kids and adults alike?
[534] A. Yes, and that was the provision that they came in under, that there was an open gym at that time and if they wanted to come and share it with whoever else was there, they could do it.

Q. And I could have come that day, as well?
A. Yes, sir.

Q. With respect to the Boy Scouts or Cub Scouts meeting and using the pool facilities that you testified to on Direct Examination --
A. Right.

* * *

[535] Q. And was it also your testimony that if there is anything of a controversial or a potentially controversial nature that the sponsor

of that club would typically meet with you to discuss the proposed activity?
A. That's true.

Q. And in your job as head of the Activities at the high school, is it your practice to become involved in those sorts of discussions regarding outsider speakers?
A. Yes.

Q. Is it also true that outside speakers are occasionally brought in to address the students in a particular class?
A. Yes.

Q. And if there is anything of a controversial or of a potentially controversial nature in regard to that, is that discussed ahead of time?
A. Yes. I may not be involved in that discussion but I would be with the activity area.

Q. With respect to the activities and if you know with respect to the classroom setting, if we would have a potentially [536] controversial subject, are steps taken on your part to assure that even treatment or balanced treatment of the particular subject matter be given?
A. Yes.

Q. With respect to the Future Business Leaders of America, for example, there has been previous testimony that outside speakers come in and talk, is that correct?
A. That's true.

Q. Are you aware of the subject of conversation or the topic which was addressed by that outside speaker?
A. Yes.

Q. And what was that?
A. The last one was just -- and I think it was the last one -- was a topic about business. In FBLA two young people had started their own business. They didn't dwell on their particular name product or however but just the formulation of business and what they -- what they went through to develop and formulate that.

Q. You have had outside people come in to the school in connection with the Computer Club, as well, haven't you?
A. Right.

Q. Did you receive a request at any one time that the Computer Club allow a particular individual from a particular company to come in and talk?
A. Yes, I did.

[537] Q. And were you involved in the decision as to how the activity with that outside speaker was to be structured?
A. Yes.

Q. And what was your input in that regard? What was the request, first of all, and how did you handle that request?
A. Okay. The question posed by the sponsor to me was, "Is it okay to have someone come in who represents a company, that would visit with

youngsters in the Computer Club about computer usage and what they could do in terms of using a computer and what voluminous numbers of things could be done by individuals that were computer-smart?" My reaction was, "That's super, if that's what they will do. We can't permit them to be in the salesmanship of their particular company's product but if they are talking about computers and computer use, that certainly would be acceptable."

Q. So on that basis you approved the outside speaker --
A. Yes.

[539] Q. Mr. Huston, since the Boy Scouts have been permitted to meet at the school three years ago, has there been a change in Board policy that you know of?
A. Not to my knowledge.

Q. The same policy as far as then using the facility still exists?
A. As far as I know.

* * *

[540] **DAVID MOSHMAN, Ph.D.**, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAVIS:

* * *

[541] Q. Dr. Moshman, where are you currently employed?

A. I'm employed at the University of Nebraska at Lincoln.

Q. And what capacity?
A. I'm Associate Professor in the Department of Educational Psychology.

MR. DAVIS: Your Honor, may I retrieve an exhibit?

THE COURT: Yes, you may.

MR. DAVIS: Exhibit 80. May I approach the witness?

THE COURT: Yes.

Q. I am handing you what has been marked as Plaintiffs' Exhibit 80. I would like you to take a look at that. Can you identify that exhibit for me?
A. Yes. That's my Vita.

Q. And what is the date on that Vita?
A. November, 1986.

Q. Is it fairly current? Is there any updating that is required on that Vita?
A. It's fairly current. There are a few things on it that are listed as in preparation that have been complete or in press that have been published, but no major changes.

Q. What are those things that are in the process of being published?
A. Let me take a look. The book by Moshman, Glover and Bruning entitled Developmental Psychology that's listed [542] as being in press has been published. It came out in January, '87.

Q. Anything else?
A. The chapter on Page 4 by Moshman and Eastman entitled The Creative Construction of Rationality, listed as in preparation is in fact complete. It hasn't been published yet.

Q. Dr. Moshman, would you briefly tell the Court about your educational background?
A. I received my doctorate in Psychology, in Developmental Psychology, from Rutgers University in 1977. Do you want previous to that?

Q. Yes.
A. I received -- I went to high school in Brooklyn. I received an undergraduate degree from Lehigh University in Psychology in 1971 and then I received a Master's degree in Developmental Psychology from Rutgers in 1975, and then my doctorate in '77, also in Developmental Psychology.

Q. Since your graduation and receipt of your doctorate, have you done any studies in Developmental Psychology?
A. Yes, I have. That's a major part of my job.

Q. Approximately how many studies have you done?
A. It depends I guess what you could as a study, but if you think in terms of published articles and chapters, I've published several dozen, as listed in the Vita, during [544] the last ten years.

Q. Could you please briefly explain to the Court some of those studies that you have done?

A. Yes. I've done some empirical research on cognitive development. My main areas is cognitive or intellectural (sic) development. And I have done studies on the development of various sorts of intellectual abilities, mostly abilities that involve scientific and logical and abstract sorts of concepts and reasoning during the period of adolescence and into early adulthood.

I have tested children ranging from fourth grade up through college age on a variety of intellectual tasks.

In addition to that empirical work, I have done some theoretical work on the nature of reasoning and rationality, in particular its development during adolescence and into early adulthood.

And then in addition to that, in the last five years I have been interested in First Amendment issues concerning the intellectual rights of children and students and how psychological research is relevant to those issues.

And I have published several articles in that area.

Q. If I were to ask you to clearly define your specific area of expertise, how would you do that?

A. I would say that I have two major areas. One area I would describe as the development of reasoning and rationality [544] in particular over the course of adolescence and into early adulthood and the other area I would describe as the intellectual First Amendment rights of children.

Q. What types of research or study have you done in the first area that you have described?

A. The development of reasoning?

Q. Yes.

A. Well, as indicated earlier, my empirical research in that area has consisted of looking at various kids of intellectual abilities, usually on the basis of theoretical issues. I would choose a particular kind of ability, such as the ability to test hypotheses or understand abstract concepts and logic, and then would set up a task and administer that task to children of an adolescence of the relevant ages. Typically, I've tested fourth graders, seventh graders, tenth graders and college students and then compared, of course, the ages.

Q. And you also testified that you had an expertise in the area of First Amendment rights, is that correct?

A. Right.

Q. And what type of an expertise is that? Is that as it relates to the abilities of children to reason and their cognitive abilities?

A. Well, it's somewhat broader than that. I've -- I edited a book entitled Children's Intellectual Rights that I [545] had a chapter in, and my chapter in that book develops a general framework for what sorts of intellectual rights children should have under the First Amendment. So it is an interpretation of the First Amendment as it would apply to children and that includes the issue of how empirical research on children's reasoning would be relevant to the application of the First Amendment to children.

Currently -- well, next week I will be presenting an expansion of that chapter in that work at the meeting of the Society for Research in Child Development in Baltimore and then I am currently working on a book to be published by the University of Nebraska Press entitled Children's First Amendment Rights. That expands on that.

Q. Okay. Now, you have testified about your expertise in the area of developmental -- the development of cognitive abilities in children, is that correct? Would you explain for the Court the process or the idea behind that? What process do you go through in assessing the developmental abilities of a child?
A. You're asking how I do it as opposed to how the child actually develops?

Q. Yes.
A. Well, to take a specific example of recent research, this is the research listed on my Vita as Moshman and

Franks, Development of the Concept of Inferential Validity. In that [546] research we -- we're interested in a particular logical concept, the validity of inference, which involved understanding, the -- well, being able to look at the form of an argument as distinct from the content of the argument and looking at whether a conclusion follows from premises, independent of whether it happens to be empirically true or false. And what we did to study that, we set up a variety of logical arguments, some of them valid arguments, some of them not valid arguments, some of them leading to true conclusions, some of them leading to false conslusions, and manipulating those variables, set up a variety of logical arguments.

In the first study in that series I then presented those arguments to children in fourth grade, seventh grade, and to college students, and asked them to sort the arguments as many ways as they could, and I looked at how children sorted those arguments, and then I asked them to rank them from the most to the least logical and looked at how they ranked them and found that the fourth graders, as expected, sorted arguments on the basis of what they were about and whether the conclusions were true or false, but not on the basis of the abstract logical connections.

College students, on the other hand, sorted arguments on the basis of the logical connections within them. They were attending to the validity of the inference.

Seventh graders fell somewhere in betrween. A [547] substantial proportion of them performed like the college students and a substantial proportion of them performed like the fourth graders.

We then did two follow-up studies within that same series of research where we were trying to see in more detail what accounted for the seventh graders' performance, and so we tried to explain the -- we did this again with fourth graders, seventh graders and college students and to each group we explained what a valid inference is. We gave examples of what we meant by validity and then asked them to sort by validity and we found that the performance of the seventh graders under those conditions shot up to the level of the college students. There was no significant difference in understanding of this abstract concept between Grade 7 and college, whereas, the fourth graders did not seem to profit from that. Their performance remained very poor. It appeared that no matter how you explained it, they just did not grasp this abstract logical concept. So that would be one example of a piece of reseearch along these lines.

Q. Now, I am not a psychiatrist so I have a little bit of difficulty understanding exactly how you develop your theories in this area. Is there any person who is recognized as the preeminent authority in child development?

A. Well, I'd say the singlemost important,most famous theorist in the area of cognitive development specifically [548] would Jean Piaget, who is a Swiss psychologist. He died in 1980. But there are many extensions and derivations of his theory that are still prominent.

There are people who disagree with his theories, as well. I don't want to -- I wouldn't suggest that he is the only major theorist but he's the singlemost important theorist in the area.

Q. And you personally endorse the views of Piaget in this area?

A. I would say my general approach is in, broadly speaking, in the Piagetian tradition. I think he's wrong on some specific details and in some respects my research has contradicted some specific assertions of his but I'd say his general approach seems to be on target and is the basis for most of what I do in this area.

Q. Could you explain for the Court what his approach is, as you understand it?

A. His general view is that children, as they go through development, change systematically in how they reason about things, that is, he believes

that changes in children's intellect are not simply a matter of learning or facts but a matter of fundamental changes in the way they think about the world, and he identifies four stages of development in this process. Would you like me to go through the stages?

Q. Yes, if you would explain the four stages of [549] development.

A. The first stage he refers to is the sensory-motor stage and this would apply during infancy. The infant knows the world through its own sensory and motor activities. It knows and understands things by physically acting on them.

The second stage Piaget refers to is the preoperational stage and this would be typical in preschool age children, and at this stage the child is capable of using symbols or mentally representing things. So the child now can think in the sense imagining something that is not physically present and thinking about it. The reasoning about those things still tends to be often illogical in various ways but nevertheless it is genuine reasoning in the sense of a genuinely mental activity.

The third stage Piaget refers to is concrete operations and this typically begins around the age of six or seven. Some research, recent research, suggests it may in fact begin somewhat earlier than that. The concrete child is more logical and systematic in their reasoning

abilities. They follow logical norms better than a preoperational child would.

And then the final stage Piaget refers to as formal operations and he indicated that this develops during early adolescence. Typically you begin seeing formal operational reasoning around the age of eleven or twelve. This is a more abstract kind of reasoning where the child can look at abstract [550] logical connections, can hypothesize things that are not -- that are not real, things that are counter-factual, and test those hypotheses.

Q. You mentioned the final stage. At what age would you say the final stage has become fully developed. You mentioned it began at the age of ten or eleven. When does that reach its full development?

A. That's a complex question. Piaget himself indicated that formal operational reasoning begins developing about the age of eleven or twelve and is fully developed around the age of thirteen or fourteen. More recent research, including my own, suggests that the development of formal operational reasoning does begin about age eleven or twelve. You don't find those abilities earlier and you do find them in eleven- and twelve-year olds, but that the full consolidation and generalization of those abilities can continue into adulthood. There is no clear cut end point. Even among adults, although you find virtually all adults, I think, are capable of

formal reasoning, you find differences in how well they apply it, and so an adult may not use formal reasoning in an area they're not familiar with, and as they get familiar with that area they may further develop their ability to use formal reasoning in that area. So I would say formal reasoning continues to develop potentially throughout adulthood.

Q. Could you identify for the Court at all a definitive [551] line when that final stage is reached in, say, the majority of children?

A. I think the only definitive line you can talk about is the line of when should the majority be capable of formal operational reasoning, and I would say that's at about age eleven or twelve, that is, children beginning at about age -- beyond the age of twelve or so all seem to be capable of formal reasoning. They differ greatly in how widely they apply it, how well it's consolidated and applied to different content, how efficiently they use this reasoning, and there is no clear cut line on that further development. But in terms of the formal abstract abilities being present, I'd say they're present in virtually all normal individuals by around age twelve or so.

Q. So it would be your testimony then that a junior high student would have reached the final stage in that development?

A. Yes, it would.

Q. And of course it would carry on to a high school student, as well, but the high school student has reached the line of development, it's just a matter of exercising his understanding, is that correct?

A. Right. I would say the only difference between, say, a junior high school student and a high school student and a college student would be in how widely they use these [552] abilities, the variety of content to which they can apply them, and the efficiency with which they use these abilities. Those kinds of quantitative changes. But there's no qualitative difference in terms of the type of reasoning that they are capable of.

Q. What about the average student in high school? How would his reasoning ability differ from that of a ten- or a eleven-year-old?

A. Fairly dramatically. I would say the average high school student is -- well, let me not say ten or eleven -- do you mean like nine or ten versus twelve? Where do you want --

Q. Well, you drew a somewhat definitive line at ten or eleven, or nine, ten and eleven.

A. Okay. I would say before that line, if you want me to compare a high school student with a child, say a 10-year-old who is not yet at that line, I would say there is a fairly dramatic difference. The typical high school student is capable of a wide variety of abstract abilities, being able to look logically at arguments, being able to formulate

hypotheses, being able to test hypotheses, whereas a typical nine or ten-year-old is pretty limited to concrete reality, that is, the ten-year-old can think logically about things that are real and immediate to him or her but not about abstract or hypothetical entities.

[553] Q. When would you say then would a child first begin to perceive such concepts as hostility or discrimination?

A. It depends on exactly what you mean by those. I'd say hostility can be perceived very young. Even an infant can perceive a kind of an emotional hostility and react to it, and discrimination in a very concrete sense of hostility toward me, I would say could be perceived by a very young child, certainly a preschool age child.

Now, discrimination in a more abstract sense, if we're thinking in terms of ideas like equal opportunity or equal protection under the law and the full legal meaning of those terms, those are pretty abstract concepts and probably require formal operational reasoning, so I would say children probably become capable of understanding those concepts beginning about age eleven or twelve.

Whether a given individual understands them and how well the individual understands them will depend on their experience with relevant kinds of issues. So I would say all individuals beyond the age of twelve or so are probably capable of

understanding discrimination in that abstract sense but they may or may not do so, depending on their particular experiences.

Q. So would you say that -- let's take an example. If you have a five-year-old black child, a girl for instance, would she be able to perceive at the age of five years [554] hostility towards her as a result -- or because of her skin, the color of her skin?

MR. DAUBMAN: Objection, lack of foundation and relevancy, Your Honor.

THE COURT: Overruled. I take it that this is foundational in nature perhaps. You may answer.

A. Yes, I think a five-year-old black child could perceive -- certainly she could perceive hostility toward herself and depending on circumstances she might get the idea that it has to do with her being black.

Q. Now, how would her perceptions differ if she were eleven or twelve years old?

A. I think an 11- or 12-year-old would be much more likely to be able to at least begin to think of the idea of discrimination against me because I'm black as having not so much to do with me personally but with black people in general, and even more than that, with an abstract idea of discrimination against people on the basis of race, and perhaps understand general legal concepts that could

relate to that kind of discrimination. So the understanding beyond the age of eleven or twelve, that is, beyond the -- within the period of formal operations would be at a more abstract level and would see the broader kinds of legal or moral issues associated with it, the understanding that the younger child would be more personalized.

Q. Okay. I want to get a little bit further along into the high school scenario and how the abilities of a child to reason in high school compare with those of a college student. Is there any definitive line at all between the abilities of a high school student to reason on a given subject and the abilities of a college student to reason?

A. I wouldn't say there's a definitive line. There may be some degree of difference between the average high school student and the average college student. If you think in terms of -- what complicates this is there are great individual differences among high school students and among college students. If you think of a range of intellectual abilities among high school students and the range of intellectual abilities among college students, you'd find a tremendous amount of overlap of those two ranges, though probably more college students would be toward the upper end of that and more high school students toward the lower end of that.

Q. In what way would a high school student be weaker in his reasoning ability than a college student?

A. A high school student probably lacks the wealth of experience that a college student has had, just in the course of living a certain number of years, and so the high school student, although capable of formal operational reasoning, may not apply it as broadly or as efficiently. If you introduce a specific issue, for example, to both groups, the college [556] student is more likely, depending upon the issue, to be familiar with it and to perhaps use formal reasoning whereas the high school student may not be familiar with that issue and may not reason about it in a formal or abstract way, although they would be capable of doing so if they had more experience with the issue. So the difference would be in terms of the application of the reasoning, depending upon your experience with various issues.

Q. Dr. Moshman, you were hired by me to testify as an expert in this case, were you not?

A. Yes.

Q. And are you familiar with the issues in this case at all?

A. Yes, in a general sense.

Q. What is your understanding of those issues?

A. My understanding of the issues is that a group of high school students at Westside High wished to form a voluntary religious group and was denied permission to do so by the

school, and that this -- well, at lesat in part that this issue relates to a law called the Equal Access Law, that the issue is given the fact that the high school permits a variety of student groups to meet on school premises, on what grounds can it select which groups can meet and which groups cannot, and specifically can it exclude groups specifically because they are religious groups.

[557] Q. Given your understanding of the issues, and let's assume that that understanding is correct, let's formulate that into a hypothetical, for instance. We've got an average high school in an average town. The attendance in the high school is approximately 1,000 students or thereabouts. The school permits students to engage in outside or extra-curricular activities, including the formation of school clubs. Let's assume that approximately 25 to 30 school clubs are currently allowed and permitted to meet by the school. In that kind of an environment, I would like to ask you a few questions and I want you to testify only to those things that you can testify to with reasonable certainty. Okay?

* * *

Q. If that school were to prohibit a religious student [558] club from meeting on the same basis as the other clubs are allowed to meet, what would the average student at that school perceive that denial to mean?

A. Well, a lot of students may not be aware of the issue, of course, but the students who have asked for the formation of the club and any other students aware of it might perceive a hostility toward their club, and, depending on rationale, might perceive this as a hostility toward religion if the only rationale given is that religious clubs cannot meet but other clubs can meet.

Q. If a religious club were permitted to meet in that kind of a forum, how would the average student view the relationship between the school in that kind of an instance and the student? The school's endorsement, as it were, of that club and the student's individual request to meet?

A. I think again a lot depends on the specific circumstances. I think if the school made it clear that any student group can meet and that the school, for example, in posting a list of student groups, if the school makes it clear on that list, these are voluntary student groups, the school doesn't endorse any of these groups, is not opposed to any of these groups, it's up to individual students if you wish to participate or not, I think the average high school student could understand that and would understand these are voluntary groups and the school is neither supportive of them [559] nor opposed to them.

* * *

Q. Can education of the student clear up any problem with regard to the endorsement of a religious club in the public school?

A. I think it could. This is where you get to the distinction I made earlier between concrete and formal operational reasoning. I think a child below the age of eleven or twelve might well lack the ability to understand the abstract distinction between a voluntary student group and a school-sponsored group, and it may be for that child, no matter how you would explain it, they would just not know what you were talking about and would assume any group meeting on school premises is somehow endorsed.

For a child beyond the age of eleven or twelve, they may or may not spontaneously understand the First Amendment issues involved here and understand that the groups are voluntary, but I think it could be explained to any child beyond that age in a way they would understand and they would recognize that the school is not endorsing the group.

Q. Is there a possibility -- let me rephrase that. [560] Would they perceive at all, and we are talking about a high school student now -- would they perceive at all by the mere fact that a religious club was absent from the forum, would they perceive that in any way? What implications would that give rise to?

A. It depends on why it's absent on the context. I think if the issue has never come up and there are just a variety of clubs and none of them are religious, most students would only notice what clubs are there and would not notice the absence. In general, people tend to notice what's present rather than what's absent.

I think if there has been an issue in the school where religious clubs have wished to exist on the same basis as other clubs and have been denied that opportunity, students who are aware of the issue may then perceive the absence of religious clubs and the presence of others and on the basis of that perceive some degree of hostility toward religious.

Q. Do you see any significant difference at all between the ability of a high school student to differentiate between teacher-directed or state-directed, if you would, activity and student-initiated and directed activity as compared to the ability of a college student to perceive that same thing? Do you see any significant difference between them?

A. I'd say there's probably little or no difference in the ability to understand that. There may be differences in [561] the spontaneous understanding of that, that is, if it's not explained by the school, a college student, because of greater experience, might more readily understand the nonendorsement by the school of groups that are allowed to meet and the high school student might spontaneously be more liable to

make a mistake about what's going on and perceive an establishment of religious. But I think with adequate explanation there would be no difference. I'd say this is similar to the research I described earlier where in terms of logical reasoning ability, in spontaneous understanding I did find a difference between the seventh graders and the college students in my study, but when the issue was explained and it just took five or ten minutes of explanation of what was going on, the performance of the seventh graders improved up to the level of the college students, whereas the performance of the fourth graders did not change. I think you would find a similar kind of phenomenon in terms of an individual's understanding of the abstract issues here in terms of school endorsement and voluntariness.

* * *

[562] **WARD SYBOUTS, Ph.D.**, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. VEITH:

* * *

[564] Q. When you say "school activities," what are you referring to there?

A. School activities have been referred to in the past as co-curricular activities or extracurricular activities, and they involve such things as athletic programs, drama,

music activities outside of the classroom, and debate, and then go on into publications of students; you'll get into social activities, Student Leadership activities, Student Marketing activities, Student Leadership in the area of cheerleading, so you have a variety of student activities that are covered in that general area.

Q. Just give us basically a short historical background [565] as to the development of student activities in the public school system.

A. Student activities, as they have developed in the public schools, came about as a result of student pressure. Initially, student activities emerged in small colleges around the country. As public schools and secondary schools took form in this nation, in the early part of the previous century, school activities were really forbidden for the most part. Horace Mann brought in some speech activities and some chorus work in one of his schools as probably the first exception to the general rule that school activities were not permitted in the school.

But then as student pressure grew and as outside adult interests grew, educators began to realize that there were going to be school activities whether they sponsored them or whether they agreed with the idea or not. Consequently, after the turn of the century, after 1900, school activities began to be more common in

our public schools, and then in the 1920's there was an increase in the acceptance of school activities.

In the 1930's, you might say there was a maturity of accepting school activities into the secondary schools.

In the '50's, there was a wide expansion and as girls' athletics, for example, was included in the programs, that kind of expansion and maturity took on larger numbers in [566] the schools.

Q. And that has continued to develop since then?

A. I think that after the 1960's there has been a leveling off. In other words, you might call it a saturation point of activities in schools.

Q. Is it safe to say, Dr. Sybouts, that the primary emphasis behind student activities was the student interest for various activities?

A. Very definitely. Student interest was perceived in these activities and, as I mentioned, they were inevitable. Young people are going to be young people. They are going to be involved, and school people came, I think, to a realization that it would be much better to capitalize on this interest and this involvement to improve the educational experience for young people, and they also felt that it would be much better as a group of school officials to have control of those activities, so that

they could give some direction to those activities, and in so doing assure that they would contribute.

* * *

[568] Q. Would you please -- you have used the term "school program" and I believe that in your writings you have subdivided that program into different areas. Would you please explain to the Court the various subdivisions in a school program as you see them?

A. The school program for secondary schools can be divided into subcategories and this is something that could be done differently and this is just one way it's done. But there are those courses which are required courses. They are required for graduation. Then there are those courses that are elective courses. They contribute to the students' credits that add toward the total number needed for graduation but they are not required specific courses. They are electives [569] from which the students can choose.

Then there's a third area that has often been referred to as the co-curricular or extracurricular area, the area that I refer to as school activities.

There's a fourth area that can be identified and that would be student services such as counseling and health service.

There's a fifth area that is auxiliary services. In other words, your food services and your transportation services are the ones that are generally identified as the fifth or auxiliary area.

Q. Within the area -- I think the third area which you indicated was student activities, can that also then be subdivided?

A. Yes, and there again people divide that differently in terms of their perception and how they might see it. I've suggested that one category could be identified as performing activities. Performing activities are those activities where students literally go through an activity that is seen by the public or read by the public -- athletics, drama, music, speech or debate, and school publications could be considered as performing activity.

You can have other categories. Leadership activities -- leadership activities might involve such activities as Student Council or Student Forum or Student Government, it [570] goes by different names in different schools.

Another area that is involved in student leadership typically is the area of cheerleading and the school spirit leadership.

You have other categories that can be identified such as your class-related activities in the way of clubs. These are usually listed as a Spanish Club or Computer Club, a lot of

activity and club emphasis in the area of Vocational Education or Business Clubs.

You then have social activities and social activities again can be divided in various ways. You can have school dances. You can have school banquets.

And then ceremonies where you might have an awards ceremony or an awards assembly, and you can go on in that point until you get to the graduation activities. And then you will have some supporting kinds of activity where students get into merchandising and in this day and age that's a pretty big business in some schools.

You'll have student services activities, and not all schools have all of these activities, but these are general classifications that you can use to identify different kinds of activities.

Q. Within the club area I believe you have mentioned that there was a subdivision I think that you called those that were extensions of a class, such as the Spanish Club?

[571] A. Yes.

Q. Are there also other clubs like service clubs? Is that a category also?

A. It could be. Some people talk about those as categories. Other people don't.

Q. Where would those fall? I mean would that be a subcategory under club?

A. I think they could be moved back and forth from one category to another because these categories are not ironclad. I think a service club could be under an area of leadership.

Q. You also find a subcategory known as special interest clubs?
A. There are some special interest clubs. An illustration that might be a Ham Radio Club.

Q. Would Chess Club be a special interest club?
A. That would be a special interest club.

* * *

[572] Q. I am going to talk to you briefly about trying to divide clubs into what is known as curriculum or non-curriculum and I would like to have your definition as someone who works in this field of what curriculum would be from the standpoint of a club. What is a curriculum club?
A. I think this rose from, first of all, a philosophy about education. In other words, if a person has a rather broad perspective of education and the philosophy that grows from that broad perspective, they might identify what is curriculum-related in one way. In contrast to that, the person who might have a narrower view, a narrower philosophy, of curriculum might, in turn, identify what is curriculum-related and what is non-curriculum-related differently. So if we might, for the sake of building a base, indicate that there

are those theorists of curriculum and we have certain people like Alexander and Sahler who have written about that because [573] they have studied curriculum from a historical and an application base. Or you might have another curriculum person by the name of Tyler and he, too, has studied curriculum but looked it from a little different and a little broader base. Tyler talked about the total society and the learner and the content. And these kinds of curriculum specialists suggest that the curriculum is the total learning experience in the school.

From a practical point of view, I think we find a little narrower view of curriculum, and there is a recent book and I just was able to look it over very recently, it is written by a man by the name of Clathorne, and the book is entitled Curriculum Leadership, published in '87. In this particular book, unlike some of the other theorists, Clathorne is taking just a little bit narrower view of curriculum and he is looking at it from a more practical and less theoretical perspective.

But which of these theorists is right? I don't think there is a right or a wrong. It is simply a matter of where you are looking at something from your vantage point. So you have the theorists such as those that I mentioned who see everything that is done in the school as the curriculum of the school, and in fact if we go back to 1959, Robert Frederick wrote a book on

extracurricular or co-curricular activities entitled The Third Curriculum because he was seeing [574] school curricular activities as being a total part of the curriculum.

In contrast to that, you will have people who say the curriculum is made up of the courses that are offered for which there is credit granted. How you are going to draw that line between one extreme and the other is going to depend upon how you perceive it.

So if we look at what has come through the legislation on this, I don't think, as I have read that, that the legislation is taking the broader theoretical view. They are more in the middle ground, which is saying that curriculum is consisting of courses that are offered by the school.

Q. As such, I would like to go down through a list of clubs that you will find on Exhibit 63 and ask you in your opinion what you just testified, whether those clubs would fall within a curriculum-related or a non-curriculum-related grouping.

THE COURT: Under whose theory, Mr. Veith?

MR. VEITH: Under the theory that he had just stated that he felt the Legislature had adopted on equal access.

MR. DAUBMAN: On that basis, I would object to it. It calls for a legal conclusion of the witness, Your Honor, interpreting legislative history of the Act.

THE COURT: Well, it certainly may call for some mixed facts and law. I will hear it and try to sort it out [575] if I can. You may proceed.

Q. From that, Dr. Sybouts, looking at the Exhibit 63 that you have there and the activity, first of all, I guess starting out with what is known as Interact, have you had an opportunity to review this on a previous occasion and look at the description of the club known as Interact?

A. Yes. Interact would be by some definitions a non-curriculum-related club. But this is a hard line to draw and if we look at some of the other activities I think that the difficulty in drawing that line becomes even more apparent.

There is a club that is listed, International Club I believe is the title -- let's see if I can spot it very quickly --

Q. The top of Page 2, the third one down.

A. Yes. Well, that's the Interact. And then International immediately below that. The international Club is probably non-curriculum-related by the definition of some but it would be curriculum-related if you were to relate it to the goals in the Westside School system which has as

one goal global education. Yet there is no course of International or Global Education, to my knowledge, in their curriculum.

Q. I am asking you to testify, however, not both sides, but as you have studied the guidelines of the Equal Access Act and as you believe the line should be drawn from that [576] where Congres (sic) maybe stood in that, whether Interact would be curriculum or non-curriculum related.
A. Interact, as I would understand it, would be non-curriculum.

Q. Okay. How about International Club?
A. That's a tough one to decide upon. I would relate it as a curriculum-related club because of the goal that is set in the Westside School system.

Q. How about Chess?
A. That would be more likely considered as a non-curriculum-related club.

Q. How about Subsurfers?
A. That would probably be one that could be debated but there is a swimming class and so it could be curriculum-related to that Physical Education class.

Q. Would it make any difference whether an individual received credit or an extra grade by reason of having been in Subsurfers?
A. That's just one more complicating way of looking at this. I would not see any of the information that I have read or any of the interpretations that I have seen that would suggest that you had to have credit as a part

of the school activity to make it curriculum-related. But, as we know, for example, if we are in Band and the Band instructor indicates at the beginning of the year, and the policies are set up, the [577] regulations are set up, so that the Band student is expected to march at the football games or to play at certain activities and they get their final grade in Band as a result of participating in those activities, sure, then the grade is a part of the school activity.

In other activities, you will not find that to be the case and yet they can still be curriculum-related.

Q. How about National Honors Society?
A. National Honors Society is a national honorary that is sponsored through the National Association of Secondary School Principals, and students are chosen for admission into the National Honors Society based on their academics, on their service, on their leadership. It's very difficult to say that this is non-curriculum-related when their grade point average is one of the criterion that is reviewed in selecting students for it and yet it is not related to any one specific class.

Q. How about Welcome to Westside?
A. That would be a service activity and probably not related to a course and therefore it would be considered non-curricular.

Q. How about Student Advisory Board and Student Forum?

A. That in most schools would be considered non-curricular. In some schools where they have an actual class for leadership and a class for which students can get [578] credit, then by that definition, that relates an activity to a class that's in the curriculum, it would become curriculum-related. But in most schools, at least eighty per cent of the schools that I am familiar with, they don't have a class in Leadership, and, therefore, your Student Council or your Student Forum is non-curricular.

Q. You have reviewed Exhibit 63 and the various clubs that were on it. In your opinion, does Westside high School have one or more clubs that in your opinion, according to what you have seen Congress looking at, are non-curriculum-related?

A. Yes.

* * *

CROSS EXAMINATION

BY MR. DAUBMAN;

* * *

[579] Q. In order to determine whether a particular high school student club is curriculum-related or not, is it necessary to look at the required and elective courses that are offered at that particular school and the course goals and objectives of those particular classes?

A. I think that logically a person should do that. I don't know that it would be absolutely necessary. In other [580] words, I'm not sure that if the officials in any school were to try to make that distinction, they would need to know whether a course was required or elective. In other words, that distinction is a distinction which may help people understand how a program or a curriculum is put together but it may not be necessarily very helpful in terms of knowing whether or not there is a relationship between an activity and courses. I think they would need to know simply whether or not that course was in the list of courses that granted credit.

* * *

* * *

[581] Q. With respect to your testimony regarding Subsurfers, you expressed the view that that was probably curriculum-related or could be curriculum-related because of the tie-in to swimming at the high school, and swimming was, as I understood your testimony, something that was done in Physical Education classes, is that correct?

A. That's correct.

Q. Would you take personally, as an expert in this case, the same sort of approach with respect to the other student clubs, for example, Student Forum and Student Advisory Board?

A. Yes, and an illustration might be the student cheerleaders. This gets to be in one of those shaded areas again. If athletics is considered

curriculum-related, then is the cheerleader, who is at the athletic contest, involved in cheerleading, a part of that athletic contest or is the cheerleader separate? I think most people would say, "Yes, cheerleading is a part of that; therefore, it must be curriculum-related."

Q. With respect, though, to Student Government, Student Advisory Forum, would it make a difference in your opinion as to whether Student Government is curriculum-related [582] depending on the type of specific course objectives and goals in the government Department of that high school?

A. Yes, I think it could and yet that's a matter of where that shaded area comes into view and where the line is drawn. But just as the International Club can be identified as curriculum-related because of the goal of global understanding, then you could take that same reasoning and say that the Student Forum or Student Council or Student Government could be curriculum-related as it might relate to objectives in the curriculum that would try to help students develop a better understanding of our society and our government and how it works.

Q. If you had, Dr. Sybouts, as a goal and objective in the Sociology Department of the high school, a goal and objective of community service and community involvement, and if in fact for extra credit in one or more Sociology classes you could take part

as a student in community involvement, would that affect whether or not a club like Interact is curriculum-related?

A. Yes, I think it could.

Q. In what way?

A. Again, there are specific objectives within the school curriculum or the documented curriculum that would focus on community service and then if it could be seen that those specific objectives within the documented curriculum [583] were reflected in a specific course and those course activities -- or let me not call them activities -- the things done in that course led then to out-of-class activities related to Interact or to other kinds of service fucntions, (sic) then you could follow that logic to say that it was curriculum-related.

Q. I want you to assume, doctor, that one of the course -- or some of the course objectives in the Math and Science Departments at Westside High School deals with abstract thoughts, analytical thinking, logic, those sorts of things; I want you to further assume that those processes are involved in the playing of chess; under those circumstances can chess be viewed as related to curriculum?

A. We're taking still a further leap into that -- that line of reasoning.

Q. Grey area.

A. Yes, and I think it would lead to further debate because I think it's a little further from the content, and it would be harder to argue that the

activity of playing chess was that closely related. So I think that would be a harder line to draw.

Q. I am going to read a statement to you, Dr. Sybouts, and I would like you to answer if you agree with this statement or not. "While there are numerous definitions for the curriculum of schools, it is defined here as the total of [584] all the school-related experiences provided for the growth and development of pupils. The curriculum can be categorized as follows: A) Required courses and mandated programs; B) Elective courses; C) School activities programs; D) Auxiliary services and student affairs. All four elements are needed." -- Do you agree with that statement?

A. Yes, even though that statement has four categories, it grouped two categories into one, the auxiliary services and the student affairs.

Q. Were you, in fact, the author of that statement?

A. Yes.

Q. And the first part of that statement talks in terms of "There are numerous definitions for curriculum," but you define it for purposes of what I wrote --

A. Yes.

Q. -- as encompassing those things?

A. That is right. That is my personal view.

Q. And that was my next question. From your personal view as an expert in this area, do you define student activities and clubs as curriculum?

A. Yes, I do.

* * *

REDIRECT EXAMINATION

BY MR. VEITH:

[585] Q. Dr. Sybouts, isn't it true under this broad theory that Mr. Daubman was just asking you about, just about anything could come under the school program or curriculum as you call it, right?

A. That's right.

Q. And in your article you are in effect using the term "school program" and "curriculum" interchangeably, aren't you?

A. Yes.

Q. Because earlier you had testified that this was a school program, a total umbrella, right?

A. That's correct.

Q. Now, your view that you hold is a narrower view of what is curriculum-related than what you perceived was meant by the Equal Access Act in the hearings, correct?

A. Yes. In other words, the people who developed the equal Access Act used a different definition than my own personal definition.

Q. What you were just testifying to with Mr. Daubman was your own personal definition and not what you perceive from the materials provided to you?
A. That is correct.

Q. Okay. Under your particular definition, laying aside [586] all the other problems that may exist with a separation of church and state et cetera, could a Bible Club under the theory that it adds to the total program of the school be considered to be curriculum-related?
A. Again, looking by whom are you following in terms of a definition? If you're taking the Equal Access Act, then I don't think it would be curriculum-related. If you are to take my personal view, then I think it would be, and, again, linking that to goals and objectives, see, there are goals and objectives of the highest priority in the Westside Schools. They talk about values and morality.

Q. So under that theory, if goals and objectives are to develop good citizenship, develop morality, increase knowledge and skills, et cetera, a Bible Club under your definition would be curriculum-related?
A. It could be.

Q. Just like other clubs that you talked with Mr. Daubman about that could be?
A. That's right.

* * *

[590] **JAMES E. FINDLEY, Ph.D.**, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAUBMAN:

Q. Dr. Findley, as principal of Westside High School, are you familiar with the operation of student clubs and [591] organizations?
A. I am.

Q. Do many of the clubs use the bulletin boards at the high school to announce meetings and activities?
A. Yes, they do that and they also put up other signs around the building on the walls, on butcher paper.

Q. And what are these signs? Do they announce student clubs and activities?
A. Right, events that they've got coming up or that they want to emphasize to get other kids to know about.

Q. Does the school have any regulations, prohibitions or restrictions regarding the posting of meetings and activities of the student clubs?
A. Yes. We don't allow anything lewd or crude to be put up. We also deny them or tell them not to put it on painted walls and that kind of thing.

Q. With those exceptions, are there any restrictions regarding the posting of such club announcements and activities by those clubs?
A. Not really.

Q. Do all of the Westside high School student clubs have the right to use these bulletin boards and to make these signs and post them on the walls of the high school in order to announce their meetings and activities?
A. They do.

[592] Q. Are there any clubs that have been denied that right?
A. Not to my knowledge.

Q. Do many of the Westside High School clubs receive coverage of their activities in the Westside High School student newspaper?
A. Yes.

Q. Are there any prohibitions regarding such coverage of club activities in the newspaper other than circumstances where it might be libelous or obscene?
A. No.

* * *

Q. Does the high school Year Book contain articles regarding many of the clubs and the activities of those clubs during the previous year?
A. Yes.

Q. Are there any prohibitions regarding coverage of the club activities in the high school Year Book, again other than circumstances where there is a potential for libel or obscenity?
A. No.

[593] Q. Are Westside High School student clubs allowed to have announcement of club meetings and activities over the public address system of the school?
A. yes, they are.

Q. Is that done on a regular basis?
A. No.

Q. How is it usually handled?
A. We usually try to limit the use of the intercom because it's fairly disruptive to the school day, so anything we do would be -- (clearing throat) excuse me -- we try to do that outside of classes or before school, and on occasion we let kids use it for special announcements for kids during homeroom time.

Q. Is there a homeroom at the beginning of each school day?
A. Yes.

Q. In that homeroom does the homeroom teacher make announcements to his or her homeroom students regarding school events and activities?
A. Yes. That's one of the primary duties of the homeroom teacher during homeroom is to make kids aware of activities that they may be involved in or affect them when activities they're involved in meet.

Q. Does the homeroom teacher receive a typed list of those announcements?
[594] A. Yes. At the start of every school year in an opening packet, the homeroom teacher receives a copy of the activities available.

* * *

Q. No. My question is does the administration have any [595] restrictions regarding those announcements before they give them to the homeroom teachers?
A. Yes. We require that the sponsors sign the notes that kids bring up to put into the announcements so that they are aware of what we are going to announce.

* * *

[598] Q. Does Westside High School conduct a Club Fair each year?
A. Yes.

Q. Will you describe for the Court exactly what takes place at the Club Fair?
A. Under the auspices of Student Government, they sort of coordinate that, under Roger Hering, Assistant principal, and they -- clubs that are interested in letting students know the activities of their club indicate to Mr. Hering that they would like to have a booth, what we call a booth, it may be a table or something set up where they would promote their club and also have a sign-up sheet for the young people available to participate.

Q. What part of the building is the Club Fair held in?
A. It's held in our -- what we call our Rec Gym, our old Gym, which is right next to the concessions stand, about right centrally located again in the school.

Q. And does this Club Fair take place during the school day?
A. Yes, it does.

Q. Do all of the student clubs at Westside High School have the opportunity to participate in Club Fair?
A. They do.

Q. Do the clubs have the right to solicit new members [599] at the Club Fair?
A. They do.

Q. How long have you been a Principal at Westside High School?
A. This is my third year.

Q. Prior to that time was it your previous testimony that you were a Vice Principal at Westside?
A. Yes.

Q. Was that between 1976 and '84?
A. Yes.

Q. Prior to 1976 were you an assistant Principal at Westside?
A. I was.

Q. Was that between 1970 and 1976?
A. It was.

Q. In your capacity as Principal at Westside High School have you had daily involvement with high school students?
A. I have.

Q. Was that also true when you were a Vice Principal and an Assistant Principal?

A. Yes.

Q. During these time periods have you had the opportunity to observe the reasoning ability of high school students?

A. Yes.

Q. You also had the opportunity to observe the ability [600] of high school students in regard to perception, understanding, abstract thinking, analysis?

A. I have.

Q. According to the uncontroverted facts set forth in the Order on Pretrial Conference in this case, Bridget Mergens requested of you in January of 1985 permission to form a Christian Club at the high school that would be identical in formation, rights, privileges, terms and conditions as other Westside High School-affiliated student clubs except that her proposed club would not have a faculty sponsor. If you had allowed such a club to form and meet and if such club had engaged in and was afforded the same rights and privileges as the other clubs at the school, do you have an opinion as to whether the high school students at Westside would view the Christian Club as evidencing or constituting an endorsement of Christianity over other religions?

* * *

A. High school students, in my opinion, interpret things [601] based upon what has happened in the past and,

you know, what the procedure has been, and I would think if we had a club that was a Christian Bible Study Club or whatever the club might be, that the way we have functioned in the past they would very easily see that as an endorsement of a club or activity by the school.

Q. When you say "Based on how we have operated in the past," what are you referring to? What do you mean by that?

A. We've always had a sponsor in charge of a club and we've always had that club, the organization of that outlined and been aware of it, and we've always encouraged kids' participation in clubs and activities. In fact, I talk to -- when I talk to parents I emphasize the importance of being involved.

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[602] Q. Could you briefly describe for the Court the approximate percentages of unstructured time for tenth, eleventh and twelfth graders?

A. Tenth graders are unscheduled probably about 20 percent, 25 percent of the time. Juniors, 30 to 40 percent, and seniors 40 to 50 percent.

* * *

[603] Q. During unscheduled or unstructured time are Westside High School students allowed to go to various areas within the high school building?

A. Yes.

Q. What are some of those areas?
A. We have Instructional Material Centers or Resource Centers in Science, Social Studies, English, Math, Foreign Language, Business. They can go to one of those areas. [604] They could go to a laboratory area in Science or Art, possibly even in Physical Education there are laboratory areas, or they could go to the cafeteria which is a talk area.

Q. Other than -- with respect to the cafeteria, you referred to that as "a talk area." Could you explain to me what you mean by that?
A. Students can come in there and they have to be seated and can talk about -- they don't have to be working on a specific subject in that area although they may be.

Q. Are students allowed to talk in the other areas that you testified to, the Instructional Material Centers, Science labs, et cetera?
A. They are allowed to talk in those areas although the structure there would be greater, more controlled, and at times emphasize zeroing in on the subject more although there is some open discussion.

Q. Focusing on the cafeteria as a place to go during unstructured time, do students in fact informally gather in these areas to discuss matters?
A. Yes.

Q. Do you or does the school in any way regulate or censor the content of the students' speech in the cafeteria?
A. No.

Q. Have you observed Westside High School students discussing political issues in the cafeteria?
A. Yes.

Q. Have you observed Westside High School students discussing religious issues in the cafeteria?
A. Yes.

Q. Have you or to your knowledge any member of the administration and faculty at the high school regulated, prohibited or censored any such speech activities in the cafeteria?
A. No.

Q. What time does school begin in the morning?
A. 8:00 o'clock.

Q. Does each morning of the school day begin with a homeroom?
A. It does.

Q. That homeroom commences at 8:00 o'clock?
A. Yes.

Q. What time does the high school building open in the morning?
A. 6:30.

Q. Are students allowed into the building beginning at 6:30?
A. Yes.

Q. Between 6:30 in the morning and 8:00 o'clock when homeroom begins are students allowed to go to various areas within the building?
[606] A. Yes.

Q. What are some of those areas where students are allowed to be present?
A. Actually almost any area that is not locked. They tend to congregate, probably, in the corridors and in the cafeteria.

Q. Could you describe or explain to the Judge what areas are typically locked between 6:30 and 8:00 o'clock in the morning?
A. I'm sure there are probably some individual classrooms locked but most other areas are open.

Q. Do Westside High School students in fact informally gather in these areas and engage in conversation?
A. Yes, every day.

Q. Does the high school or anyone at the high school in any way regulate or censor the subject matter of those conversations?
A. No.

Q. At the time Bridget Mergens made her request for the Christian Bible Study Club, did you advise her that you had no objection to her meeting with other students informally to discuss Christianity or religious matters?
A. I did.

Q. What was Bridget Mergens' response to that suggestion?
A. Bridge pursued that and said she wanted to have this [606A] particular group recognized by the school.

* * *

[607] CROSS EXAMINATION

BY MR. VEITH:

* * *

Q. Dr. Findley, since the bulletin board is so freely [608] available, would it have been possible for the school to place a notice on the board, allow the Mergens' group to meet, and place a notice on the board that although you had, let's say, a monitor in the club that it was not an official sanctioning of Christianity, so to speak?
A. Could we do that?

Q. Could you have done that?
A. We probably could have. We've had no reason to do that in the past.

Q. Could you have made an announcement in the newspaper or over the intercom again stating that although the club was being permitted to meet, it was being permitted to meet because of an interpretation of the Constitution or the Equal Access Act and that the school was not endorsing a particular religion by allowing this group to meet?
A. Yes, again I guess I never got to that point.

Q. You never considered that as an alternative to a complete denial of the club to meet?

A. Right, because the request was to have the club and I saw that immediately in the context we have already talked about.

Q. We briefly discussed I guess the Club Fair. There is no requirement, is there, on the part of students to join a particular club at the Club Fair, is there?
A. No.

[609] Q. And students don't go running out grabbing other students and pulling them into clubs, forcing them to join, do they?
A. No. Kids talk to them pretty, you know, aggressively at times about joining clubs.

Q. It's an explanation of what the club does, right?
A. Not always.

Q. Encourages them?
A. Just to encourage them to join the club, yes.

Q. Dr. Findley, back to this modular system and open system. If Bridget Mergens had never asked permission to use the facilities at Westside High School and if her group in fact had gone to meet after school hours on a voluntary basis, what action would you have taken?
A. I may not ever would have known.

Q. If you had known, what would you have done?
A. It depends on the context of how she asked the questions.

Q. If you had found out that there were a group of students with Miss Mergens meeting in one of the classrooms after school, would you have done anything about that?
A. Probably not if I wouldn't have known the context of it. No.

* * *

[610] Q. Would you, Dr. Findley, have told those kids they couldn't meet?
A. If what?

Q. If they were meeting in a classroom in your school [611] or after school discussing religious subjects?
A. I probably would not have inquired into that.

Q. Do you recall testimony -- I'll withdraw the question. The question is if you had known they were in the classroom discussing religious subjects on a voluntary basis, would you have asked them to stop doing that?

* * *

A. If -- if that -- if I perceived that as a formal thing that they were going to continuously do and emphasize within the building and if I perceived that that was what was happening, I would have probably not let them meet. But if they were just discussing as a group of kids, I'm not going to go in, you know, and stop that.

Q. Okay. Dr. Findley, you heard testimony, I believe, while you were in the courtroom that Lisa Healy and three or four other students on a regular basis in the morning in the IMC room and they meet for fellowship, if you will, to discuss [612] religious topics and to encourage one another. Do you intend to prohibit them from continuing to meet like that?

A. I don't know that that's all they meet for. I didn't understand that that way. I assumed they got together socially at that time, and the way I remember that discussion was they could or could not talk about that, and it has not been our practice to go in and monitor a kid's speech.

* * *

Q. If the Mergens group had met on a regular basis after school in one of the classrooms, would you have prohibited them from meeting?

A. I think I just answered that in the sense that if I would have perceived that as a formal ongoing thing, that they were making a formal meeting, then I would think that would depend on a number of things, and I would have probably not let them continue. But if it is just for them to get together and talking about it and whoever happens to show up or there happens to meet, I wouldn't object to it.

Q. How would you make a distinction as to whether it was formal or not?

A. I think it would become obvious if that were something [613] that the group themselves made known and said, "We're meeting there regularly and, you know, you can come in if you want to come in," then I would not -- I would have probably intervened.

Q. You would have told them they couldn't meet?

A. Yes.

Q. On what grounds?

A. The same grounds that I had before. I think it would be in violation of our school policy and also my understanding of equal access would be that they have somehow formalized that outside of me, and there's got to be some line there where that decision -- you know, somebody has got to make a decision on that and if you just do it without talking about it, at some point you draw the line and --

Q. Who draws the line, Dr. Findley?

A. I suppose I would have to, in the building.

Q. Based on your determination as to when it becomes a formal meeting, is that right?

A. Well, and I -- whenever that happened I would discuss that with other people. I wouldn't just go down there and make that decision point blank. I'd see what the situation was and I would talk to other people in that process, like Dr. Tangdall and Mr. Huston.

Q. Would you try to ascertain what the group is discussing?

[614] A. I would not go down there and stick my nose in on the kids just to go down and see what they're talking about, no.

Q. Would you ask them what they were talking about?

A. Probably not. Normally I would not if kids were meeting and talking, unless it became something -- something that became known to me. I guess I don't know where that line is. Maybe you do. But I don't know how that becomes known to me, however it becomes known to me. I would not go down and supervise kids constantly, if that's what you're asking me. No, I would not do that.

* * *

THE COURT: I think I have a couple here. A small amount of confusion and it may not be all that important, but I have a little confusion about the use of the bulletin boards or posting things. You indicated that there were no restrictions on using the bulletin boards and posting things but I'm not sure, is that limited to the in-school clubs, I mean the sanctioned clubs?

THE WITNESS: Yes, it is.

* * *

[615] THE COURT: So things may get up without the sanction of the administration and then they --

THE WITNESS: And we take them down.

THE COURT: -- come down if they're noticed.

THE WITNESS: In fact, the poster that you are referring to, I took down.

* * *

[616] THE COURT: Now, you have testified, if my notes are accurate, that in your opinion that the school by letting a club organize and meet would be seen by high school age students as an endorsement by the school of the subject matter of the club. I believe that is my understanding of your opinion.

THE WITNESS: An endorsement of the club.

THE COURT: Well, you said -- I think there was a question asked, "Would you -- would, in your opinion, the students think that the school was rendering an endorsement?" --

THE WITNESS: Right. Can I --

THE COURT: -- of the --

THE WITNESS: Yeah, I think they could in light of the way we have always functioned because we've encouraged kids to join clubs and activities, and in that sense I could see that they would think we endorsed it.

THE COURT: And I guess my question was your reasons for that and at least you have given me one and that is because of

the historical way in which clubs have -- that you have [617] encouraged people to organize and participate in clubs?

THE WITNESS: Yes. I've never -- I don't ever recall a time when I would not have felt comfortable in endorsing a particular club in the sense that it would be something that would fit within our policies and our mission and goals statement and that I could encourage kids, if they had an interest in that area, to be involved in -- all kids.

THE COURT: And I don't know how appropriate this is but, for instance, based upon that opinion, you would be with regard to Interact, which is the Rotary-affiliated group, for instance -- you would be endorsing service clubs or you would be endorsing the message of service clubs or you would be endorsing the Rotary say over Optimist or Sertoma or Kiwanis or something? I guess I am troubled by that --

THE WITNESS: yes, I understand. I don't -- I don't perceive it as endorsing Rotary at all, Your Honor, as far as interact is concerned. I think that's fairly far removed, in my opinion, and I endorse the idea of service.

THE COURT: Of service clubs or service?

THE WITNESS: Yes, right, but I would not see endorsing Interact as endorsing Rotary. I've never thought of it that way.

THE COURT: You endorse the idea of service for someone who is interested.

[618] THE WITNESS: Yes.

THE COURT: I mean you don't look down on them if they don't think a service club is for them but that it is a laudable pursuit, to concern yourself with service and so forth?

THE WITNESS: Yeah. I would say that service is something that we would encourage young people to look at. I think there is more and more of a feeling that that's a valuable part of what young people do. So that they know what that means, to give of their time in a cause of -- you know, in some sort of a cause that they feel they have an interest in. And I think, personally think, that that is something that I would see appropriate for all students. You could even make a pitch and say, "You ought to consider that as an experience, an educational experience and a learning experience, that you should have." I could very much see that for all young people.

THE COURT: How would that differ from your view in giving a generalized -- the same generalized sort of endorsement for participating in the political process even if it involved a political party or a League of Women Voters or whatever? Is there a differentiation you see in the message you would be conveying with this endorsement?

THE WITNESS: I would consider young people to become involved in political -- you know, politically what they [619] believe on a general overall basis but not encourage any one specific political kind of activity, and I would -- I think again that's something to become involved in, in

how government works, the process of government and what you believe in. The important thing is that you make the effort there and try to do that but I would -- I see them both very similarly in the sense of endorsing one thing or one idea or one particular political party or one particular service club, I think that's a different kind of thing.

THE COURT: But you don't view Interact as endorsing a particular service club?

THE WITNESS: Right.

THE COURT: But I guess where I don't see the difference is where you endorse political involvement generally and then you let them pick Rotary or Kiwanis or Sertoma or the Republicans or the Democrats or Independents or whatever. I guess I'm --

THE WITNESS: In my time at Westside High School, the experience -- my experience with Rotary, as far as Interact, is I just haven't experienced that. I've seen Interact as a club and no -- I don't think, you know, that there would ever be an occasion where I have talked to anybody about endorsing Rotary with students, with the sponsor, with anybody involved there, and so my perception of Interact has been as a service club unrelated, really, to Rotary. That [620] has not been a concern to me.

THE COURT: One last area here. There have been some questions and answers back and forth about students meeting in the cafeteria or some similar place and having fellowship and/or discussing

religious or lack thereof and so forth on an informal basis and sort of a -- I think you testified, if my notes are correct -- unregulated speech I don't know if you used the words "unregulated speech" -- on almost any subject was not censored by the administration at Westside High School, and I don't know if it was you who testified earlier or perhaps Dr. Tangdall or someone else about recommending the elimination of all clubs at the school if you were forced to permit, say, a religiously-oriented club or some such thing to meet, and the reason given for that, if I recall -- perhaps the reason I raise this is I may have misunderstood -- was that parents send their children to school and there is a reluctance to make available for them subject matter with which their parents may disagree, through a club, and I guess I'm troubled by the difference here. If you know that young people at Westside High School are discussing religious or politics or communism or whatever they may want to discuss on an informal, unregulated basis, where is the line, the bright line or the grey line or whatever line between the risk that Child X is going to inadvertently or on purpose sit down at a table in the cafeteria and get involved in a [621] lot of far-ranging discussion?

THE WITNESS: That's a good point. It seems to me that there's no way that I could regulate the speech of young people outside of the school day. I mean, they can be with whoever they want to be, and when they're in school I certainly can't monitor what they are talking about with their friends before school or between classes or whatever.

THE COURT: And I have a sense that you're reluctant to get into the business of attempting to regulate that.

THE WITNESS: That's right, I am, but I think from another perspective, and looking at it from my own perspective and how I interpret what the School Board is saying, and I think what parents expect through that School Board expectation is that we not put together a -- or that we have a club that would in effect say, "Yes, we do have it, we do recognize it but we can't make a decision on who enters and exits that, but, yes, it's there and it's known and it's available to everybody," so it's seen as our endorsement of it or could be seen as our endorsement of it. I think there's a distinction there between what happens when young people simply get together and talk and what's provided, and to me that's where I see a distinction.

THE COURT: And you say, "In what's provided," and what is provided? A schoolroom? A monitor? An access [622] to the bulletin board? Is that the differentiation that you see?

THE WITNESS: Well, in regular meeting times and the topic that is presented only from one perspective.

THE COURT: But likely there is only one perspective being discussed frequently around the breakfast table in the cafeteria in an informal basis. I guess I'm --

THE WITNESS: It seems to me it could be just as likely that the opposite conversation could be there, though. They

may not be discussing Christianity. They may be discussing atheism and I -- I can't, you know --

* * *

RECROSS EXAMINATION

BY MR. VEITH:

Q. With reference to Interact, Dr. Findley, Interact engages in certain service projects, correct?
A. Yes.

Q. And do you see that as an endorsement of those projects the fact that Interact is a club at Westside high School?
A. An endorsement?

Q. Of the projects that --
A. By whom?

[623] Q. Pardon?
A. I'm sorry, I don't understand your question.

Q. Well, when the Interact students go out and do certain projects in the community, if they do that, do you see that -- because it's the interact Club at Westside High School, do you see that as the school endorsing that particular project?
A. Yes.

Q. Do you see the community viewing that as an endorsement by the school of that particular project?
A. Yes.

* * *

JAMES A. TANGDALL, Ph.D., having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DAUBMAN:

* * *

[625] Q. Are you familiar with the overall missions and goals of the School District?
A. Yes.

Q. Are the Westside High School student clubs intended to conform to the educational missions and goals of the School District?
A. Yes, they are.

Q. In your opinion, do they all in fact conform to those educational missions and goals?
A. Yes, they do in my opinion.

Q. Do the activities of the Westside High School student clubs serve the educational objective -- do all of them serve the educational objective of one or more classes or curriculum offerings at the high school?
A. All of them do, they serve one or more, yes.

Q. Does Chess Club develop, enhance, supplement [626] course objectives in high school in the Science and Mathematics Departments?
A. That's one of the purposes of it, yes.

Q. At one time in recent history, has Chess Club -- or, I'm sorry, has chess activity taken place in the Math Resource Center rooms?
A. Yes, it has.

Q. And why was that?
A. Well, as I recall, and I'm not sure exactly when, but I think it was some time probably around 1980, but I know that Mr. Glor (phonetic), the head of the Math Department, came to me and wanted to know if they could allow chess to be played in the Math IMC, and I questioned him about that and told him I would be concerned about the disruption that may cause et cetera, and he said that the Math people, the Math teachers, had felt that they would like to make that request in their Resource Center and see if they could control the noise level so it's possible, and I said, "Well, if you think you can do it, you know, it's your area to control," but then I pursued and asked him why he wanted that to happen, and he said it was their feeling that those students that had participated or been active chess players had performed better in some of their Math classes, and I said, "Well, if you feel that," I said, "fine, we will try it," and I think it lasted about a year, a year and a half, and they came back and [627] said, "You know, we think we better leave all the activity in the club because it is just too disruptive, they get too vociferous in there sometimes in their discussion," and so we

eliminated it from the regular Resource Center and restricted it to the Chess Club.

* * *

Q. Is one of the purposes and objectives of the Social Studies curriculum to prepare students for effective citizenship?
A. Yes, it is.

Q. Is effective citizenship enhanced, in your opinion, by participation in clubs such as Interact and Zonta?
A. Yes.

Q. May students earn extra credit in one or more Social Studies classes for participation in community projects?
A. Yes, they may.

Q. At a prior time at the high school, was that a required activity in one or more courses?
A. Yes, it was at one time a required activity.

Q. Now it is an extra credit activity, is that what [628] you are saying?
A. That is correct.

Q. One of the clubs listed in the Order on Pretrial Conference which has yet to be discussed in this case is Photography Club. Does the Photography Club exist at Westside High School at this time?
A. At this time I do not believe that it does because it is offered as a class in our Art Department as a regular

Photography class. It has existed in the past in a number -- from year to year as a club.

Q. In the Physical Education classes offered at Westside High School are students exposed to different types of sports activities?
A. Yes, they are.

Q. Could you briefly highlight the various activities?
A. Well, we have a number of activities in our Physical Education classes, from swimming to weight-lifting to volleyball to badminton, to golf, et cetera, and although we have some concepts running through that curriculum to develop certain cardiovascular learnings and also to visit -- or a concept dealing with nutrition et cetera, one of the major overriding goals of our Physical Education Department is to develop an interest in life-long activities, to assist kids in developing wise use of their leisure time, and also to develop to their maximum their physical and emotional health, [629] and we just think as many physical activities we can expose kids to so that hopefully one or more of them will interest certain kids, that they will carry that on beyond school, certainly more so than football, for example, or wrestling.

Q. Can you describe in general terms the goals and objectives of the Government curriculum at Westside High School?

A. Well, certainly one of the overriding goals of -- in every course of study, in every department, and certainly in Social Studies -- in every course of study there is a selected body of knowledge that is, you know, the heart of the course, but also in every course of study there are certain other goals that we feel are very important, and in Social Studies developing effective citizenship, developing leadership, developing community involvement, commitment to community activity, are strong goals in our Social Studies Department, and in our American Government class particularly one of the real goals is to develop an appreciation, a commitment to the democratic society and how that operates and the processes that that democratic process -- or what those democratic processes are.

Q. Could you describe for the Court the organization, structure and functions of Student Advisory Board and Student Forum?

[630] A. Student Advisory Board is an elected -- like it's been discussed many times in this court, most schools, a lot of schools call it the Student Council, and at least when I was Principal, up to three years ago, and I think it is still structured the same, the number may vary, but there are six elected representatives from each class that are on the Student Advisory Board and they go through an election process, they give speeches, et cetera, to run for that, and post signs throughout the building et cetera, and they have

their regular mock election -- or their regular election and they are elected to that.

In addition, that branch of the Student Government would probably be similar, although certainly there are a lot of dissimilarities -- but it would be similar to the United States Senate.

We also have what we call the Forum and each homeroom in that school, and there are probably a hundred homerooms in that school, each elect a Forum representative to that House of Representatives, so to speak, which we call the Forum, and that is our student government so that they can function in those activities that are designed by them and for them.

Q. Could you describe in general with brief terms the overall course goals and objectives of the Business Department or the Business curriculum of the high school?

[631] A. Well, certainly like I say, What we are trying to do in our Business Department is to acquaint students with the business world, to let them know of the kinds of skills and knowledge that they must have if they want to pursue that kind of a career once they graduate from Westside, whether that career would be immediately in the world of work or going on to college, and that's why we offer a whole array of clerical courses, a whole array of general business courses, including General Business Accounting, Business Law et cetera, and then we have an array of

Marketing and Sales courses, included Marketing and Sales, Distributive Education et cetera, and in addition to that we are certainly trying to teach students about entrepreneurship, free enterprises system, again the overall global kinds of things they need to know if they're going to go into a business-related career.

Q. Are you familiar with the Future Business Leaders of America student club at Westside?

A. Yes, I am.

Q. Would you describe for the Court the goals and objectives and operations of that club?

A. Well, the Future Business Leaders of America is a club that -- that is again opened to all students who wish to learn more about businesses, business opportunities, how they function, develop leadership skills, et cetera, and it is strongly endorsed by the State Department of Education, [632] and I think the literature is available to indicate that the State Department of Education feels that this is a organization that we should very highly encourage kids, students, to participate in. They have a State Leadership Conference every year and, as a matter of fact, I think that just occurred last week, and I just got a note from the sponsor of that this week, or last week, I guess, to keep me informed as to how well they had done, and I think our club is the largest club in the state. We captured 27 individual awards in Public Speaking, Accounting,

Marketing, all the various avenues in the Business Department on a competitive basis with other schools. That is a very detailed thing but it is certainly a very highly structured, business-oriented organization.

Q. To your knowledge are any or were any of these student clubs at Westside High School initiated by students?

A. Well, I think one of the things that I have heard discussed a lot during the last couple of days is the fact that a lot of -- and as Dr. Sybouts testified to and I certainly would concur with him, at least the history that I've read on education, that a lot of the outgrowth of student activities throughout this country have come about because of student interest, and a lot of our clubs at Westside, a seed has been planted because of student interest on their part, but the initiation of the club is -- is solely [633] our responsibility in that school. It's up to Mr. Huston as the Activities Director to investigate that possibility, to find out the kind of sponsors we might have available, the qualifications of that sponsor, what the -- what the objectives of that club are and how they tie in to our goals and missions of the school system, and if they conform to Board policy. There's -- the interest, the seed for interest is created lots of times by students, but the initiation of a club, every club there is initiated by the school and controlled by the school.

Q. Are there any clubs that exist at Westside High School that are directed and controlled by students as opposed to being under the direction and control of the administration?
A. No, there are not.

* * *

[634] BRIDGET COLLEET MERGENS, recalled as a rebuttal witness in her own behalf, having been previously sworn, testified as follows:

* * *

DIRECT EXAMINATION

BY MR. VEITH:

Q. Miss Mergens, you were present when Dr. Findley testified concerning the request that you made to him about meetings and clubs?
A. Yes, I was.

Q. Did Dr. Findley ever tell you that had you met informally and not told him about it or if he had not found out about your club formally, that he would have allowed you to continue to meet?
A. Yes. He said if -- if -- if I would have just gone ahead and met but not said anything, then it would have been -- it would have been okay.

Q. It would have been okay for you to go ahead and meet and not say anything to anybody about the meeting?
A. Yes.

* * *

[635] FROM DR. FINDLEY'S DEPOSITION

"Question: Have any --" -- by Mr. Davis -- "Have any political figures ever come to Westside to give speeches or political presentations in the classroom?

Answer: Uh-hun.

Question: Who were they?

Answer: I don't remember all of them. We had local Congressmen come and speak, Ed Zorinsky, Exon. We've had local City Council members, mayors. We've had the mayoral candidate and when we've done that we've had all of them. We have had Ernie Chambers and we have had Charlie Washington." --

Then, Your Honor, Page 77, starting at Line 6: (from Deposition of Dr. Findley)

"Question: (by Mr.Davis) If Bridget had never asked [636] permission to use the facilities and if her group had in fact gone to meet after school hours on a voluntary basis, what action would you have taken?

Answer: I probably would never have known. I can't stop kids from discussing things. I don't try to do that.

Question: If you had knowledge of the fact that they were in fact meeting without permission?

Answer: I would never stop an open discussion if they want to talk about it.

Question: If they were using one of the classrooms to discuss religious matters and they had not asked your permission to meet?

Answer: If they were on a regular basis, I would tell them that they couldn't do that.

MR. DAVIS: Do you have anything further?

BY MR. VEITH:

Question: --" --

Pardon me. I will skip, Your Honor, to Page 78, Line 6:

"Question (by Mr. Davis): You stated that if Bridget had not asked permission and had in fact gone to meet with other students on a voluntary basis in a public school classroom there at Westside and you had had knowledge of that, that you would have denied that, that you would have stopped them from meeting.

Answer: If it were on a regular basis.

[637] Question: If this were on a regular basis?

Answer: And if it were on a planned activity, but if it's an off-the-cuff discussion I can't do that.

Question: On what basis would you have to stop the discussion?

Answer: If this were regularly planned and they regularly planned to meet and set up regular meetings, I'd tell them they couldn't do that.

Question: What if a group of kids decided to begin to meet in a public school classroom to play checkers?

Answer: I wouldn't let them do that unless they had a sponsor, if they did that regularly, unless we tied it to our goals and objectives. We'd have to talk about it with them. To just have a group of kids meet without a sponsor in any classroom, that means we're liable. If anything would happen, I'd be liable. So I've got to take that into consideration, too.

Question: If a group of students meet during class hours during I believe they call it 'comp' time or modular instruction time, modular scheduling, if they meet, okay, if a group of students decided to meet --" -- pardon me -- "to begin meeting on a regular basis during the modular scheduling time at Westside and the subject matter of their meeting was religious, what action would you take?

Answer: I wouldn't let them meet if it were on a regular [638] basis.

Question: If the subject matter was what you would consider not religious, what would you do?

Answer: If they regularly met in the classroom?

Question: Yes.

Answer: I would not let them meet.

Question: For what reason?

Answer: They wouldn't have a sponsor available. We do not have during our regular day meetings. We discourage kids meeting in open classrooms. We have study centers for them to go to because we do not have a sponsor person for them." --

* * *

[641] 15) That on March 4, 1986, plaintiff Mergens petitioned defendant Board of Education for permission for the proposed Christian Club to meet at Westside High School. [642] As explained to the Board by plaintiff Mergens, the Christian Club would not have a faculty sponsor except as required by School Board policy for custodial purposes. If required, a faculty sponsor would attend in a nonparticipatory capacity only. The Board of Education voted to uphold the denial of defendants Findley, Tangdall and Hansen for plaintiff Mergens to form such a club.

* * *

18) That there are no space limitations or time and place restrictions which would prevent plaintiffs' [643] proposed Christian Club from meeting at Westside High School."

COMMUNITY RELATIONS

USE OF SCHOOL FACILITIES 7260

There have been recent requests by community groups and school personnel to use our facilities on Sunday. Particular requests have centered on the ABC Building for receptions, teas, and dinners.

In view of our marketing strategy and our emphasis to serve as a keystone to our community, we recommend the elimination of the statement: "Use of the facilities shall not be permitted on Sundays, except in the case of an extenuating emergency."

While the elimination of the statement does not encourage use of facilities on Sundays, it does give the Superintendent authority to grant permission.

PLAINTIFF'S TRIAL EXHIBIT 54

WESTSIDE COMMUNITY SCHOOLS

USE OF SCHOOL FACILITIES

REVISED - AUG. 10, 1982

ELEMENTARY

Cost - $25.00 for the first two hours plus $12.50 for each additional hour or fractional part thereof. In addition there will be added a charge of $12.00 per hour for any overtime custodial hours.

Saturday - $25.00 for the first three hours plus $12.50 for each additional hour or fraction thereof. In addition there will be a charge of $12.00 an hour for custodial time.

JUNIOR HIGH & SENIOR HIGH (Gym or Cafeteria)

Cost - $35.00 for the first two hours plus $12.50 for each additional hour or fractional part thereof. In addition there will be a charge of $12.00 an hour for any overtime custodial hours.

Saturday - $35.00 for the first three hours plus $12.50 for each additional hour or fraction

PLAINTIFF'S TRIAL EXHIBIT 55

thereof. In addition there will be a charge of $12.00 an hour for custodial time.

WESTSIDE HIGH SCHOOL AUDITORIUM (Special Permission Needed)

Cost - $200.00 for the first two hours plus $50.00 an hour each additional hour or fraction thereof. In addition there will be a charge of $7.00 an hour for a stage manager when needed.

Custodial time - In addition to the above there is to be added a charge of $12.00 per hour for any overtime custodial hours.

NO SCHOOL FACILITY CAN BE USED AFTER 11:00 P.M.

Board of Education
Policy 7260
((See reverse side)

USE OF SCHOOL FACILITIES.....7260

It is the intention of the Board of Education to cooperate with school related organizations and community groups in providing the use of school facilities for their meetings and functions. However, the utilization of school facilities by community groups will never take precedence over the use of buildings by school personnel.

In compliance with state law and because of the need to protect buildings from abuse, and guard against possible interference with the normal use of buildings for school sponsored activity, the following regulations will apply:

All groups that are not school sponsored must obtain permission from the Superintendent. Use of the facilities shall not be permitted on Sundays except in the case of an extenuating emergency.

When building facilities are made available to an eligible group, custodial service for the cleaning, light and heat as needed will be furnished by the school. If costs for custodial services are charged, the payment must be sent directly to the office of the Superintendent. In no event shall the custodian be paid by the agency using the school facilities.

Any person or group renting or using school facilities shall assume responsibility for maintaining order, protecting property, and providing and assuring the safety of persons participating or attending and otherwise following the general rules pertaining to the use of the building.

Any person or group using school facilities and equipment must pay for any unnecessary wear and tear, destruction or damage of such facilities and equipment. It shall be the judgment of the Superintendent as to the amount to be paid, based upon the cost of repairing or replacing such damage or wear or tear. Such persons or groups shall also be liable for any action brought about by any person as a result of such use of facilities and equipment.

Since public agencies may not, under the state constitution, further any religious group, religious groups may not use any school facilities or equipment for the purpose of holding religious services, except in an emergency.

School facilities will not be used for profit making by any group except those organizations established within the schools.

No activity or entertainment may be held or presented in school facilities of a lewd or morally

objectionable nature, or which advocates or favors, or has the reputation of advocating or favoring, unlawful violence or rebellion against citizens of the United States or which is unlawful.

BY SPECIAL YOUTH GROUPS

Boy Scouts, Girl Scouts, Campfire, and similar youth groups properly chaperoned and supervised by a responsible adult may use designated parts of the school building as a meeting place without charge, provided they are held while the school is normally open, a custodian is available, and there is minimum interference with custodians and other school personnel.

School facilities may be used for the Saturday and the summer recreation programs conducted by the Omaha Parks and Recreation Department for the benefit of our children.

BY SCHOOL COMMUNITY ASSOCIATIONS

Adult groups sponsored by the school, such as parent organizations, and educational groups, may use the schools for meetings, upon approval of the Superintendent.

BY SCHOOL PERSONNEL

An employee of the Westside Community Schools shall not use school facilities, materials, or equipment for personal use or gain.

BY NON-SCHOOL GROUPS OR PERSONS

Non-school groups or persons, but limited to non-profit organizations, may be permitted to use or rent school facilities and equipment. The eligibility of these groups shall be determined by the Superintendent.

Eligible groups, having obtained permission from the Superintendent, will pay the established rental fee as approved by the Board.

The eligible groups, permitted to use the school facilities: (1) must be known by the school officials to possess financial resources sufficient to cover all rentals and possible damage, and (2) may be required to post a bond or provide adequate insurance.

INSTRUCTION 6180

RECOGNITION OF RELIGIOUS BELIEFS AND CUSTOMS

The Board of Education believes in the preservation of and respect for private religious beliefs. Students adhering to a specific set of religious beliefs or holding to little or no belief shall be alike respected.

No teaching within the schools shall be sectarian in nature. If any school program or instruction is, in any way, imposing upon a student's religious belief, such student may be excused from participation.

The Board recognizes the importance of teaching high moral and ethical values by precept and example in our public schools. Students will be encouraged by the staff to develop high moral and ethical values under the leadership of their parents and religious leaders.

"Each teacher employed to give instruction in any public. . . school. . . shall so arrange and present his instruction as to give special emphasis to common honesty, morality, courtesy, obedience to law, respect for the national flag, the Constitution of the United States, and the Constitution of the State of Nebraska, respect for parents and the home, the dignity and necessity of honest labor, and

other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry."
Legal Reference: Statute 79-214

WESTSIDE COMMUNITY SCHOOL
DISTRICT 66

The regular meeting of the Board of Education of School District 66 was convened in open and public session at 7:30 p.m., March 4, 1985, at the ABC Building, 909 South 76 Street, Omaha, Nebraska.

Board members present: Wayne Meier, John Goldner, Dan Garver, Helen Jean Schorr, and Helen Kelley.

Notice of the meeting and the agenda subjects was given in advance by publication in The Daily Record on Friday, March 1, 1985; a copy of which is attached to the official minutes. Notice of this meeting and the availability of the agenda was simultaneously given to all members of the Board of Education and available to anyone at the Board of Education offices. All proceedings hereafter shown were taken while the convened meeting was open to the attendance of the public.

Staff members in attendance: Ken Hansen, Jim Tangdall, Bill Hoyt, Don Erickson, Rod Johnson, Ken Bird, Bud Robinson, Lorraine Boyd, Jim Findley, Verne Moore, and Beverly Carlson.

Visitors: See attached list.

Student Advisory Board members present: Tim Bloomingdale, Ted Thompson, Dirk Hofschire, Brad Rauch, and Ruth Campbell.

The meeting was called to order at 7:45 p.m. by Mr. Meier. He acknowledged that the meeting had been publicly announced and the agenda was available to any interested parties.

A motion was made by Mr. Garver, seconded by Mrs. Kelley, to approve the minutes of February 4 and February 18, 1985, as presented. Motion carried unanimously by roll call vote.

The Treasurer's Report was given by Mrs. Schorr, along with the motion to approve expenditures amounting to $1,903,883.07. Second, Dr. Goldner. Motion carried unanimously by roll call vote. Mrs. Schorr reported that with 48% of the budget expended, everything is in good shape. (A detailed copy of the Treasurer's Report is attached to the official minutes.)

Mr. Meier stated that the Board of Education had received a letter from attorney Douglas Veith who asked to appear on the agenda as the representative of Bridge Mergens, a Westside High School student, regarding the federal equal access law. (A copy of the letter is attached to the official minutes.)

Mr. Veith addressed the Board and stated that the issue is whether or not the School Board would elect to pass a motion

to change school policy concerning a religious group meeting at Westside High School. Mr. Veith stated that the meeting request was made under the 1984 federal equal access law which states that school districts with "limited open forum" policies must not deny access to their buildings to unsponsored student groups who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical or other content of the speech at such meetings.

Mr. Veith stated that his definition of "limited open forum" was if the school offered extra-curricular activities not directly tied to the curriculum and if only students participated in the forum.

Bridget Mergens addressed the Board, stating that students are encouraged to participate in activities of interest to them. The fellowship Bible study group would meet before school and attendance would be voluntary. Other area high schools allowing similar groups to meet include Burke, Papillion, South, Bellevue East and Bellevue West. All groups are student initiated. If an instructor is present, he is there to observe only. Attorney Veith stated that it would be Bridget's decision whether or not to take the matter to federal court (should the

Board deny her permission), which would be the first area test of the new federal law.

Board members questioned Superintendent Hansen as to the current Board policy. Dr. Hansen stated that according to Board policy, District 66 has a closed forum, which permits school buildings to be used only for school-sponsored, curriculum-related activities.

A motion was made by Mr. Garver, seconded by Mrs. Kelley, that the Board uphold an earlier administrative decision to deny Bridget Mergens permission to conduct a fellowship Bible study group at Westside High School, which is consistent with District 66 policies. Voice Vote: Affirmative: Garver, Goldner, Kelley and Meier. Negative: None. Abstain: Schorr. Motion carried.

* * *

There being no further business, Mr. Meier adjourned the meeting at 9:00 p.m.

/s/Dan Garver
Secretary

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Caption of case omitted in printing)

AFFIDAVIT OF JAMES E. FINDLEY
IN OPPOSITION TO
REQUEST FOR PRELIMINARY INJUNCTION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

COMES NOW James E. Findley, upon being first duly sworn on oath, and deposes and states the following in opposition to the request of plaintiffs for a preliminary injunction in the above captioned case.

1. That I am the Principal of Westside High School and one of the named defendants herein.

2. That I am familiar with the policies of District 66 and Westside High School regarding student clubs and organizations.

3. That I am familiar with the student clubs and organizations which currently exist at Westside High School,

PLAINTIFF'S TRIAL EXHIBIT 61

which such clubs and organizations are generally described in Exhibit "A" attached hereto and incorporated herein by reference.

4. That each of said student clubs and organizations are either curricular or are directly related to the curriculum of Westside High School.

5. That each of said student clubs and organizations are directly related to the educational mission and goals of the Westside Community Schools, as more particularly described in Exhibit "B" attached hereto and incorporated herein by reference.

6. That each of said student clubs and organizations are approved by Westside High School and District 66 and have one or more faculty sponsors.

7. That Bridge C. Mergens made a formal request to me for permission to form a student religious club or organization; that club be officially sanctioned as a Westside High School club; and that said club be permitted to conduct

fellowship meetings in a Westside High School classroom immediately prior to school.

8. That I denied such request on the grounds that it did not comply with the policies of District 66 and Westside High School.

9. That I offered to meet with the Minister or Pastor of Countryside Community Church, 8787 Pacific Street, Omaha, Nebraska, which such Church is located approximately 100 feet from Westside High School, to arrange for the group to conduct their fellowship meeting at that location.

10. That Bridget Mergens stated that she and her group were unwilling to meet at that location because it would not be the same as meeting at Westside High School.

11. That Westside High School has what is commonly referred to as modular scheduling, whereby students are allowed a substantial amount of free or unscheduled time.

12. That under the modular scheduling at Westside High School, approximately 20% of the time of sophomores is unscheduled, approximately 30%-40% of the time of juniors is unscheduled, and approximately 40%-50% of the time of seniors is unscheduled, and seniors are allowed to leave school grounds.

13. That during unscheduled time, Westside High School students are allowed to be in and use any part of the school building that is not then being used for regularly scheduled classes, including but not limited to resource center, labs, swimming pool, gymnasium and cafeteria.

14. That during unscheduled time, Westside High School students are allowed to discuss any topic among themselves, including politics, philosophy, religion, literature, and any other topic.

15. That I have never requested any student to stop or refrain from discussion of religious topics during such unscheduled time.

16. That the regular school year ends May 30, 1985.

17. That in the event any one or more of the student clubs or organizations are determined by the Court to be non-curriculum related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, I would recommend to the administration and Board of Education that it consider amending the policies to discontinue such student clubs or organizations.

DATED May 10, 1985.

FURTHER AFFIANT SAITH NOT.

/s/James E. Findley
James E. Findley

SUBSCRIBED and sworn to before me this 10th day of May, 1985.

/s/Allen E. Daubman
Notary Public

(Exhibit "A" to this Affidavit omitted in printing. It appears as Trial Exhibit 63 reproduced at page 479 of this Appendix.)

**MEETING
THE
CHALLENGE**

(illustration omitted in printing)

**Mission & Goals
of the
WESTSIDE
COMMUNITY
SCHOOLS**

A Blueprint for the Future

Behind every successful program is a successful plan, and the Westside Community School system has called upon a large group of community members to help establish a Mission statement and set of Goals.

Parents, staff members, students and Board of Education members joined together as a task force in 1983 to address the changing priorities of an increasingly complex society. The result was a revision of the District 66 Mission and Goals which were adopted a decade earlier.

EXHIBIT "B"

The task force was charged with the responsibility of determining whether the Mission and Goals remained relevant and vital to today's students and society's demands.

After lengthy study, the task force made several changes in the goals to reflect changing priorities in education, but chose to make only minor changes in the basic philosophical statement contained in the Mission.

Working within this general set of guidelines, the District will endeavor to provide a sound education for each student and to meet the needs of the community through a variety of programs and projects calling for cooperation between the district and its constituents.

District 66 views the overall Mission and Goals as an outline for helping us to improve the quality of living for the entire community.

The Mission

Public education is a great constructive force for the preservation of freedom and advancement of the American democratic way of life.

The Westside Community School System, therefore, is dedicated toward being responsive to the educational needs, values, and aspirations of our citizens,

and believes that the school has an important role in helping to improve the quality of living in our community.

In our educational program, each individual will be accepted, with equal opportunity to learn, develop, and succeed. The dignity, the worth, and the uniqueness of all individuals and their heritage will at all times be preserved.

All students have the right to an education fitting their own needs, interests, and abilities. Students will be involved, when appropriate, in planning and assuming responsibilities for their own educational programs. Through the recognition of individual differences, our schools will provide the opportunities for all students to develop the values, attitudes, skills and knowledge necessary to become self-confident, responsible, productive, and contributing members of our society.

The Goals

Knowledge and Skills (Primary Responsibility)

Basic Skills - To acquire knowledge in the basic skills of communication and computation.

Skills to Use Knowledge - To develop skills for creative, constructive and critical thinking, problem solving, and evaluation.

Science and Technology - To gain knowledge and experience in the natural sciences, the physical environment, and in technological literacy.

Arts, Humanities, Social Sciences - To gain knowledge and experience in the fine and practical arts, humanities, and social sciences.

Economic Understanding - To develop the capacity to be an effective participant in the free enterprise economic system.

Health and Physical Fitness - To acquire knowledge and develop skills and interests for optimal physical and emotional health.

Global Education - To gain knowledge and understanding of the peoples of the world, their cultures, languages, and interdependence.

Personal Development
(Shared Responsibility)

Self Worth - To assist in the development of self understanding and a positive self concept.

Human Relationships - To develop the capacity to participate in meaningful personal and social relationships.

Citizenship - To develop the behaviors, values, and attitudes associated with responsible participation and patriotism in a democratic society.

Ethical Character - To refine and nurture behaviors based on acceptable standards of conduct and moral judgment.

Preparation for Future - To develop an ability to live in and adapt to a world of rapid change and technological advances.

Career Preparation - To acquire career concepts and career skills.

Respect for Learning - To acquire a positive attitude toward learning as a life-long process.

Use of Personal Time - To experience and participate in opportunities for life-long use of leisure time.

(Three photographs omitted in printing)

"The Pride Shines Through"

School District 66 is home to one high school, three junior highs and 10 elementary schools which form the Westside Community Schools.

Our total enrollment of just over 5,300 students makes us one of the larger districts in Nebraska, but we pride ourselves in a small-town caring and sharing attitude when it comes to participation in the community.

We believe that we are responsible to the entire community for providing the District's young people with a fine education and for establishing programs which our many constituent groups can use.

Some of the programs we offer, in addition to those within the schools, include early childhood education centers, adult education and an expanding volunteer program.

We welcome your questions about the District 66 schools and programs and invite you to write or call us: District 66, 909 South 76th St., Omaha, NE 68114; (402) 391-0646.

STUDENT ACTIVITIES

August, 1984

BAND - This activity is included in our regular curriculum. Extensions of this activity include Marching Band, Ensembles, Pep Band, and Concert Jazz Band. Performances, presentations, and programs are presented throughout the school year.

CHESS CLUB - This activity is for those interested in playing chess. Opportunities to play are held after school throughout the school year.

CHEERLEADERS - A girls sports cheerleader team is made up of a junior varsity and varsity. The boys sports cheerleaders consist of sophomores, junior varsity, and varsity. Tryouts for these spirit groups are held each spring.

CHOIR - This is a course offered as part of the curriculum. Extensions of this class include Boys and Girls Glee, Warrior Voices, and Concert and Chamber Choirs. Membership in these activities are determined by enrollment and tryouts.

CLASS OFFICERS - Voting and selection of junior and senior class officers for the following year are held each spring. Students interested in being a class officer will need

PLAINTIFF'S TRIAL EXHIBIT 63

to secure support, be willing to make a presentation to their class, and serve their class in an officer capacity for the following year.

DISTRIBUTIVE EDUCATION (DECA) - This is an organization that is an extension of the Distributive Education class. Membership in this activity is offered to those students involved in D.E. The club for the current year is formulated at the beginning of school each fall.

SPEECH & DEBATE - This is an activity for students interested in participating on a competitive level in both speech and debate. The season begins the first week in November and continues through March.

DRILL SQUAD & SQUIRES - These are spirit groups primarily concerned with performing at half time at football and basketball games. Selection for these squads is made in the spring of each school year. These marching units are also support groups for other athletic teams.

FUTURE BUSINESS LEADERS OF AMERICA (FBLA) - This is a club designed for students interested in pursuing the field of business. It is open

to any student with an interest. Membership begins in the fall of each school year.

FUTURE MEDICAL ASSISTANTS (FMA) - This is a club designed for students with an interest in pursuing any area of medicine. The organization assists in securing blood donations from individuals at Westside High School for the Red Cross. Meetings are held to inform the membership about opportunities in the medical field. Memberships are accepted at the beginning of school each fall.

INTERACT - This is a boys volunteer organization associated with the Rotary Club of America. Its basic function is to do volunteer work within the community. They are also a support and spirit group for our athletic teams. Membership is open to 11th and 12th grade boys; with membership opportunities being available in the fall of each school year.

INTERNATIONAL CLUB - This is a club designed to help students understand people from other countries and is developed through our foreign language classes. French, German, Spanish, and Latin teachers encourage membership in this organization in the fall of

each year. Sponsorship of foreign students, who attend Westside, is one of their major activities.

LATIN CLUB - (Junior Classical League) - This is a club designed for those students who are taking Latin as a foreign language. This club competes in competitive situations between schools and is involved with state competition as well. Students have the opportunity to join JCL beginning in the fall of each school year.

MATH CLUB - This club is for any student interested in mathematics. Meetings are held periodically during the school year.

STUDENT PUBLICATIONS - This activity includes classes offered in preparation of the yearbook (Shield) and the student newspaper (Lance). Opportunities to learn about journalism are provided for students interested in these areas. Membership in Quill and Scroll is an extension of a student's involvement in school publications.

STUDENT FORUM - Each homeroom elects one representative as a member of the student forum. Their responsibility is to provide ideas, make suggestions, and serve as one informational group to the staff and administration for

student government. Selections are made for this membership in the fall of each school year.

DRAMATICS - This activity is an extension of a regular academic class. School plays, one-act plays, and musicals are provided for students with an interest and ability in these areas. Tryouts for these productions are announced prior to the selection of individuals for these activities.

CREATIVE WRITING CLUB - This is an organization that provides students, with the interest and capability, an opportunity to do prose and poetry writing. This club meets periodically throughout the year and publishes the students' work. Any student with an interest is encouraged to become a member.

PHOTOGRAPHY CLUB - This is a club for the student who has an interest and/or ability in photography. Students have an opportunity to take photos of school activities. A dark room is provided for the students' use. Membership in this organization begins in the fall of each school year.

ORCHESTRA - This activity is an extension of our regular curriculum. Performances are given periodically throughout the year.

Tryouts are held for some special groups within the orchestra. All students signed up for that class have the opportunity to try out.

OUTDOOR EDUCATION - This activity is an opportunity for interested students to be involved in the elementary school Outdoor Education Program. High school students are used as camp counselors and leaders for this activity. Students are solicited to help work prior to the fall and spring Outdoor Ed Program.

SWIMMING TIMING TEAM - Offers any interested student a chance to be a part of the Timing Team that is used during the competitive swimming season. Regular season meets, invitational meets, and the metro swim meet are swimming activities at which these volunteers will work. Membership in this group is solicited prior to the beginning of the competitive season.

STUDENT ADVISORY BOARD (SAB) - Is another facet of student government. Members are elected from each class to represent the student body. These elections are held at the same time class officers are elected. Any student has an opportunity to submit their name for consideration.

INTRAMURALS - Are offered to Westside students these following times. Basketball begins the latter part of November and continues through February. Co-educational volleyball is the spring intramural activity. Announcements are made to students so they can organize and formulate teams prior to the beginning of each of these activities.

COMPETITIVE ATHLETICS - Westside High School offers to students the opportunity to try out and participate in eighteen varsity sports. Twenty-seven different competitive teams are available for students at each grade level. The seasons when these are offered and the procedures for getting involved can be found in the Warrior Bulletin that is published and distributed in August, prior to the opening of school.

ZONTA CLUB (Z CLUB) - Is a volunteer club for girls associated with Zonta International. Approximately one hundred junior and senior girls are involved in this volunteer organization. Eleventh and twelfth grade students are encouraged to join in the fall of each school year.

SUBSURFERS - Is a club designed for students interested in learning about skin and scuba diving and

other practical applications of that sport. Opportunities in the classroom and in our pool are made available for students involved in this activity. Membership is solicited in the fall and spring of each year.

WELCOME TO WESTSIDE CLUB - Is an organization for students who are interested in helping students new to District 66 and to Westside High School. Activities are held for them which are geared toward helping them to become a part of our school curriculum and activities.

WRESTLING AUXILIARY - Is for girls interested in supporting our competitive wrestling team. Membership is solicited prior to the competitive wrestling season.

NATIONAL HONOR SOCIETY - Westside Honor Society is a chapter of the national organization and is bound by its rules and regulations. It is open to seniors who are in the upper 15% of their class. Westside in practice and by general agreement of the local chapter has inducted only those juniors in the upper 7% of their class. The selection is made not only upon scholarship but also character, leadership, and service. A committee meets and selects those students who they

believe represent the high qualities of the organization. Induction into NHS is held in the spring of each year.

STUDENTS

STUDENT CLUBS AND ORGANIZATIONS 5610

The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.

School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.

Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

Students participating in out of school clubs or organizations may not identify the clubs as school-affiliated organizations without prior administrative approval.

PLAINTIFF'S TRIAL EXHIBIT 71

STUDENTS

FREEDOM OF EXPRESSION 5450

The Board of Education affirms that its policies and the rules and regulations promulgated thereunder shall be applied in a manner so as to assure freedom of expression for students consistent with the comprehensive authority of the Board and administration under the laws of the State of Nebraska to prescribe and control conduct in the schools.

The primary liberties in a student's life involve the process of inquiry and of learning, of acquiring and imparting knowledge, and of exchanging ideas. This process requires that students have the right to express opinions, to take stands, and to support causes, publicly or privately, in a manner consistent with the rights of others and the lawful functions and objectives of the school and the school district.

Freedom of expression does not extend to expressions of a lewd, profane or obscene nature, those which are libelous, or slanderous, those which by their utterance inflict injury or tend to incite an immediate breach of the peace, or those which do, or which school authorities can reasonably predict will, result in substantial and material interference with the work and discipline of the schools or the rights of others.

PLAINTIFF'S TRIAL EXHIBIT 72

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

(Caption of case omitted in printing)

AFFIDAVIT OF JAMES A. TANGDALL
IN OPPOSITION TO
REQUEST FOR PRELIMINARY INJUNCTION

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

COMES NOW James A. Tangdall, upon being first duly sworn on oath, and deposes and states the following in opposition to the request of plaintiffs for a preliminary injunction in the above captioned case.

1. That I am the Associate Superintendent of The Westside Community Schools (District 66) and one of the named defendants herein.

2. That I am familiar with the policies of District 66 and Westside High School regarding student clubs and organizations.

PLAINTIFF'S TRIAL EXHIBIT 76

3. That I am familiar with the student clubs and organizations which currently exist at Westside High School, which such clubs and organizations are generally described in Exhibit "A" attached hereto and incorporated herein by reference.

4. That each of said student clubs and organizations are either curricular or are directly related to the curriculum of Westside High School.

5. That each of said student clubs and organizations are directly related to the educational mission and goals of the Westside Community Schools, as more particularly described in Exhibit "B" attached hereto and incorporated herein by reference.

6. That each of said student clubs and organizations are approved by Westside High School and District 66 and have one or more faculty sponsors.

7. That Bridget C. Mergens made a formal request to me for permission to form a student religious club or organization; that club be officially

sanctioned as a Westside High School club; and that said club be permitted to conduct fellowship meetings in a Westside High School classroom immediately prior to school.

8. That I denied such request on the grounds that it did not comply with the policies of District 66 and Westside High School.

9. That Westside High School has what is commonly referred to as modular scheduling, whereby students are allowed a substantial amount of free or unscheduled time.

10. That under the modular scheduling at Westside High School, approximately 20% of the time of sophomores is unscheduled, approximately 30%-40% of the time of juniors is unscheduled, and approximately 40%-50% of the time of seniors is unscheduled, and seniors are allowed to leave school grounds.

11. That during unscheduled time, Westside High School students are allowed to be in and use any part of the school

building that is not then being used for regularly scheduled classes, including but not limited to resource center, labs, swimming pool, gymnasium and cafeteria.

12. That during unscheduled time, Westside High School students are allowed to discuss any topic among themselves, including politics, philosophy, religion, literature, and any other topic.

13. That I have never requested any student to stop or refrain from discussion of religious topics during such unscheduled time.

14. That when Bridget C. Mergens was a junior at Westside High School, I was the principal of Westside High School; that I observed Bridget Mergens in the art lab debating a bible subject; and that I did not request her to refrain from such discussion.

15. That the regular school year ends May 30, 1985.

16. That in the event any one or more of the student clubs or organizations are determined by the Court to be non-curriculum related and if the Court

determines that Westside High School has a limited open forum under the Equal Access Act, I would recommend to the Board of Education that it consider amending the policies to discontinue such student clubs or organizations.

DATED May 10, 1985.

FURTHER AFFIANT SAITH NOT.

/s/James A. Tangdall
James A. Tangdall

SUBSCRIBED and sworn to before me this 10th day of May, 1985.

/s/Allen E. Daubman
Notary Public

(Exhibit "A" to this Affidavit omitted in printing. It appears as Trial Exhibit 63 reproduced at page 479 of this Appendix.)

(Exhibit "B" to this Affidavit omitted in printing. It appears as Exhibit "B" to Trial Exhibit 61 - Affidavit of James E. Findley - reproduced at page 468 of this Appendix.)

No. 88-1597

Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing; Matt Schulz; Ingrid Kimmons; Jason Brone; Jennifer Waggoner; and Allison Wells,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF PETITIONERS

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Counsel For Petitioners

Questions Presented

The Equal Access Act, 20 U.S.C. §4071 et. seq. prohibits federally funded secondary schools sanctioning "noncurriculum related" student initiated "meetings" from discriminating on the basis of the content of speech against other student initiated "meetings." The questions presented are:

1. Whether, by requiring schools which officially sponsor co-curricular student clubs to officially sponsor student) religious meetings, the Act unconstitutionally establishes religion, particularly when enforced against a school which permits informal religious meetings, but refuses to grant them official sanction.

2. Whether, for purposes of the Act or the Free Speech Clause, certain types of student "meetings" are necessarily "noncurriculum related," and thus create a limited open forum, notwithstanding a determination by school officials that those "meetings" are curriculum related, and that only curriculum related activities will be permitted.

PARTIES TO THE PROCEEDINGS

All parties to the proceeding are listed in the caption. The caption reflects additional respondents added by virtue of an order of the U.S. Court of Appeals for the Eighth Circuit, entered on March 28, 1989.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings . . . ii

Table of Contents iii

Table of Authorities vi

Citations to the Opinions and Judgments Below 2

Jurisdiction 2

Constitutional and Statutory Provisions. 3

Statement of the Case 3

The District Court's Opinion . . 24

The Court of Appeals' Opinion. . 25

Summary of Argument. 27

Argument 32

I. WHS IS NOT A TRADITIONAL PUBLIC FORUM 33

II. WHS'S SCHOOL ACTIVITIES PROGRAM IS NOT A LIMITED FORUM 38

A. The Appropriate Focus is the Club Program 38

B. The Trial Court's Finding of a Closed Forum Was Correct 39

C. WHS Has Legitimate Pedagogical Reasons for Refusing to Recognize a Christian Bible Club . 50

D. The Christian Bible Club Would Radically Restructure the Forum 54

III. WHS HAS NO NONCURRICULUM RELATED CLUBS FOR PURPOSES OF THE EQUAL ACCESS ACT 56

A. The Act Balances Three Concerns 58

B. WHS'S Clubs Are Curriculum Related 70

IV. THE CONSTITUTION FORBIDS INCORPORATING A RELIGIOUS CLUB INTO AN OFFICIALLY SPONSORED STUDENT ACTIVITIES PROGRAM . . . 81

A. The Students Seek Endorsement of Their Religious Club . 82

B. An Officially Sponsored Christian Bible Club Would Entangle the School With Religion 87

C. The Court Need Not Reach the Impressionability Issue . 89

Conclusion 91

Table of Authorities

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473 U.S. 402 (1985). 88

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Bessemer City,
470 U.S. 564 (1985). 42

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(M.D. Pa. 1983),
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(3d Cir. 1984)
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47

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(9th Cir. 1989) 47
68-69
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465 U.S. 373 (1985) 85

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v. Kuhlmeier,
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41,48,50

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School District, 669 F.2d 1038
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Association,
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39,42,43
55,59,85,90

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28 U.S.C. § 1343 2

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20 U.S.C. § 3403(c) 63

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71,73
78

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(daily ed. June 27, 1984) 26

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(daily ed. July 25, 1984) . . 70,71
73

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1st Sess. (1983) 61

S. Rep. No. 98-357, 98th Cong.,
2d Sess. (1984) 70,73

No. 88-1597

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent.

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc., by and through her next of friends, Kenneth

Harris and Myra Harris; and Kevin Brown, etc., by and through his next of friends, Robert W. Rensing and Sherry K. Rensing, Matt Schulz, Ingrid Kimmons, Jason Brune, Jennifer Wagoner, and Allison Wells,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

BRIEF OF THE PETITIONERS

Opinions Below

The opinion of the court of appeals (Pet. App. A 1-21) is reported at 867 F.2d 1076. The memorandum decision of the district court (Pet. App. B 1-30) is not reported.

Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1343.

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."

The Equal Access Act, P.L. 98-377, 98 Stat. 1303, 20 U.S.C. §§ 4071-4074 is reprinted as Appendix C to the Petition for Certiorari.

STATEMENT OF THE CASE

School officials at Westside High School ("WHS" or the "School") subscribe to a recognized theory of education that incorporates student after-school activities into the overall School curriculum. Every student activity or club, therefore, must advance the educational "mission and goals" of the School. [J.A. 220, 230,

296-97].[1] Students are encouraged to participate in the after-school activities program, and all activities must receive official approval, must operate under the control of School administrators, and must have a faculty sponsor. Religious and political advocacy groups, however, may not receive official sponsorship.

This policy is formalized in Policy 5610 of the Board of Education of Westside Community Schools (the "School Board") [J.A. 488].[2] Both Dr. James Findley, the

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[1] Citations to the Joint Appendix are to J.A. _____. Those portions of the trial transcript not incorporated in the Appendix are cited as Tr. _____. The Court of Appeals' opinion, reproduced as Appendix A to the Petition for Certiorari, is cited as App. Pet. _____. The District Court's opinion, reproduced as Appendix B to the Petition for Certiorari, is cited as App. Pet. B _____.

[2] WHS is operated by the Westside Community Schools, known as District 66, which in turn is managed, governed, and controlled by the Board of Education of the Westside Community Schools. (Pre-Trial Order #1-3, J.A. 57).

principal of WHS, and Dr. James Tangdall, the associate superintendent,[3] testified that, in addition to reflecting WHS' educational philosophy, Policy 5610 also expresses the sentiment of parents in their community who are opposed to permitting "an unrestricted," unsupervised student activities program and who want the School to exercise control over student clubs. [J.A. 220, 243-44, 257-58, 324-25].

In the Fall of 1984, School administrators met to discuss the impact of the newly passed Equal Access Act (the "Act") on the School's activities program. They concluded that, since Policy 5610 demanded that all clubs be School sponsored and

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[3] Dr. Findley has been principal since 1984 and was an administrator at WHS since 1971. Dr. Tangdall was the prior principal of WHS and began teaching there in 1956. Both men have been intimately involved in the running of the School for many years. [Tr. 254-257, 385-387].

curriculum related, the School did not have a limited open forum as defined in the Act. [J.A. 259, 316-17].

Although all clubs at WHS are officially sponsored, students at WHS are permitted to meet informally to discuss their personal interests, including religion. [J.A. 105, 135-36, 194, 322, 426-27, 431, 438-41]. The School board also permits non-school-related groups to use the School facilities, usually for payment of a fee. [School Board Policy 7260, J.A. 456-61]. Boy and Girl Scouts and similar youth groups may use the building without charge, provided the building is otherwise open. These uses of the building are not part of the student activities program and do not carry with them access to the School newspaper, the public address system, or the Club Fair. [J.A. 434-35].

For many years School administrators knew that Respondent Bridget Mergens ("Mergens") would "visit" with other students to discuss the Bible, and they allowed her to do so without interference. [J.A. 315-16].

In January, 1985, Mergens, then a senior, approached Dr. Findley and asked him very generally about allowing students who "had similar beliefs in God" to meet before or after school for fellowship and prayer. [J.A. 71-72, 79]. Initially, Dr. Findley thought she was asking about the informal meetings that had been going on for years, and he told her that was not a problem. Mergens, however, explained that she wanted the group to be officially recognized by the School. Dr. Findley turned her down because formal recognition would contravene School Board policy. [J.A. 243-45]. Dr. Tangdall, who also

knew about Mergens' informal Bible group, and Dr. Kenneth Hansen, the superintendent, subsequently affirmed that an officially recognized Bible Club would be contrary to Board policy. [J.A. 345-46].

Dr. Tangdall and Dr. Findley met with Mergens to explain their decision. [J.A. 80-82, 317-18]. Dr. Findley suggested that the students consider using the church next door, to which he would try to gain access. Mergens rejected that offer [J.A. 81-83],[4] and in March, 1985, appealed the School administrators' decision to the School Board. The School Board upheld the denial of her request. [Pretrial Order #15, J.A. 59].

By this time, Mergens and several other students, some of whom are

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[4] Many of the students who testified at trial claimed that the church was unacceptable because it was inconvenient or because they did not want to meet on terms that differed from other student clubs. [J.A. 107, 141, 146, 165].

plaintiffs in this action (hereafter "the students"), had settled on the para-meters of their request. They wanted to form an open, nondenominational "Christian Bible Club." [J.A. 117, 113-34, 164-65]. It was to be "identical in its formation, rights, privileges, terms, and conditions as other Westside High School affiliated students' clubs," except that it "would not have a faculty sponsor." [Pretrial Order #13, J.A. 59]. This meant that the Christian Bible Club would participate in the annual Club Fair and have access to the School's bulletin boards, the public address system, the School newspaper, and the yearbook. [J.A. 100-01, 119, 132, 155-56, 419-422].

The decision to refuse official recognition to a Christian Bible Club was

based on several considerations.[5] Perhaps foremost, the Christian Bible Club, unlike all other clubs, would not be under the direct control of the administration and have faculty sponsorship, as required by Policy 5610. Faculty sponsors, who are generally paid for their participation, [Tr. 353], oversee the activities of all clubs. [J.A. 239, 250-51, 259-62]. Sponsors do not necessarily attend every club meeting, and not every sponsor is equally involved in the club's activities. [J.A. 111-12, 123-24]. Nevertheless, every sponsor is responsible for making sure that the clubs develop and maintain goals and objectives and that the clubs

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[5] This was not the only denial of a request to form a club. Over the years, suggested clubs had been refused because of finances, difficulties in scheduling, or lack of interest. [J.A. 293-94]. Several years ago, the School turned down a request for a Dungeons and Dragons Club because it was deemed inappropriate. [J.A. 367].

further the "goals and mission" of WHS and do not advocate specific ideological viewpoints. The School's educational goals, according to Dr. Findley and Dr. Tangdall, are furthered only when both sides of controversial issues are explored, whether in the classroom or in clubs. [J.A. 245-48, 254-55, 326-27, 273].[6]

The School has never permitted advocacy clubs, since they cannot comply with this policy. [J.A. 273-74]. A Christian Bible Club, presenting religious issues from a Christian perspective and operating without the moderating influence

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[6] The School permits relevant, controversial issues to be discussed in the classroom. On one occasion, an English teacher showed excerpts from the film, The Omen, in connection with a study of the play, The Crucible. Planned Parenthood has visited sociology courses focusing on marriage to discuss birth control and related issues. School officials, however, insist that faculty members insure a balanced discussion. [J.A. 95-100, 171-74, 278-80, 308].

of a faculty sponsor, would not comply with the School's "mission and goals." [J.A. 298-299, 311, 426, 441-443].

School officials also were concerned that, by allowing even one unsponsored, noncurriculum-related club to meet formally, they would open access to their forum to all advocacy groups, contrary to what they viewed as the School's educational mission. [J.A. 98, 315-316, 450]. And finally, School officials were concerned that some students could perceive of the School's official recognition of even an unsponsored Christian Bible Club as an endorsement of religion or of a particular religious perspective. [J.A. 312, 345-46, 349, 435-36, Tr. 362].[7]

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[7] At least some of the students themselves appreciated that the very existence of a Christian Bible Club could encourage other students who "would like to become Christians and follow God." [J.A. 185]. Mergens told Dr. Findley that she wanted the Club to be able to "get to" the School's nonreligious students.

Although Mergens and the other students were refused official recognition for their Christian Bible Club, they were never prohibited from discussing religion among themselves. [J.A. 105-06, 128-30, 135-36, 140, 176, 193-94, 203-04]. Dr. Findley even told Mergens that her group could meet informally, provided the meetings were not so regular they were simply a form of club, without faculty sponsorship. [J.A. 114-15, 432-34, 450].[8] But official recognition is precisely what the students wanted for their Christian Bible Club. [J.A. 115, 156, Tr. 129].

In April 1985, the students commenced this action, claiming that the refusal to sanction the proposed Christian Bible Club violated the First Amendment, the Act, and

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[J.A. 252].

[8] Dr. Findley testified that he would not allow any group, even a checkers club, to meet regularly without official sponsorship. [J.A. 451-52].

various state constitutional provisions. [J.A. 14].[9] A four-day trial commenced in May 1987. At trial, both sides explored at length the School's student activities program and its relation to the School's curriculum. The students focused on ten clubs they contend are noncurriculum-related under the Act:

Interact
Chess
Subsurfers
National Honor Society
Photography
Welcome to Westside
Future Business Leaders of America
Zonta
Student Advisory Board
Student Forum

(Pretrial Order #17, J.A. 60).

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[9] In May 1985, the district court denied the students' motion for a preliminary injunction and, in October, their motion for summary judgment. In August 1985, the United States intervened pursuant to 28 U.S.C. §2403(a) to defend the Act's constitutionality. The United States did not actively participate in the trial. Since all but one of the original plaintiffs had graduated by the time the case reached the Eighth Circuit, additional plaintiffs, who will not graduate for several years, have been added.

Attendance at these club meetings is voluntary, although club participation can earn extra credit in some classes. [J.A. 230, 444]. Participation is not conditioned upon attendance in any class. [J.A. 93-94, 122-23, 222-25]. School officials uniformly agreed that each of the clubs was intended to further either the goals and objectives of specific aspects of the School's curriculum or of its overall program.

Several of the contested clubs are integrally related with the functioning of the School as an institution. The National Honor Society, for example, is not a club in the sense that students with an interest can join at will. Rather, students are elected to the Society by a faculty committee based on leadership, service, character, and scholarship. [J.A. 267-68, 305, 327-28]. As

Dr. Tangdall testified, National Honor Society is directly related to all . . . courses because it is a way to honor students who have succeeded academically." [J.A. 305].

Welcome to Westside provides the School with a vehicle to introduce new students to other students and to the School's facilities. When a new student arrives, the faculty sponsor contacts a member of the "club," who then introduces the student. [J.A. 168-70, 194-95]. School officials testified that this activity helped further the School's overall goal of developing effective citizens by requiring student members to contribute to their fellow students. [J.A. 305, 328-29].

Two of the contested clubs, Student Advisory Board, consisting of six elected representatives from each class, and

Student Forum, consisting of an elected representative from each homeroom, operate as the student government. [J.A. 446-47]. School officials testified that both "houses" of the student government advance the goals of the School's political science classes by providing an understanding and appreciation of government processes. [J.A. 270-73, 306, 445-47].

Several clubs promote specific academic objectives. Future Business Leaders of America, strongly endorsed by the State Board of Education, invites outside speakers to discuss their businesses and how they relate to School activities. [J.A. 354, 377-79, 447-49]. Dr. Tangdall explained that the club advances the goals of the School's extensive Business Department, which offers courses in accounting, business law, marketing, and sales. [J.A. 448-50].

Subsurfers provides students with an opportunity to learn scuba diving.[10] School officials view the club as furthering one of the essential goals of the Physical Education Department--enabling students to develop life-long recreational interests. [J.A. 305]. Dr. Tangdall testified that the School offers an array of physical activities like scuba diving because students are more likely to pursue those activities into adulthood than they are traditional sports such as football. [J.A. 445].

Chess is uniformly considered by WHS' educators to supplement math and science courses because it enhances students' ability to engage in critical thought

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[10] The Subsurfers' faculty sponsor provides the equipment and instructs students in its use. [J.A. 184]. An outside group, Underwater World, participates in the scuba diving class to enable participating students to obtain certification. [J.A. 304, 307].

processes. [J.A. 220-21, 304, Tr. 498]. Several years ago, the head of the Mathematics Department requested that chess be permitted in the Math Resource Room because active chess players performed better in math classes. This caused some disruption, so chess playing was restricted to the Chess Club. [J.A. 443-44].[11]

The remaining contested clubs, Interact and Zonta,[12] are service clubs. Student members provide community service, such as collecting food for the poor. [J.A. 289]. Participation in Interact and Zonta promotes effective citizenship, a critical goal of the WHS curriculum, specifically the Social Studies Department.

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[11] Photography, formerly a club, has recently become a class in the Art Department. [J.A. 444-45].

[12] Interact is related to the Rotary Club. Zonta is the female counterpart of Interact and is affiliated with Zonta International. [J.A. 225, 287, 305-06].

[J.A. 225-26]. In certain Social Studies classes, participation in community projects earns extra credits; at one time, it was required of all students. [J.A. 444].

To counteract this testimony, the students introduced the testimony of Dr. Ward Sybouts, an expert on curriculum and student activities. [Tr. 562-64]. Dr. Sybouts explained that there are differing theories about what constitutes the "curriculum" of a school. Some theorists view the curriculum broadly, as part of the "total learning experience." [J.A. 406-08]. Others view it narrowly, as only those courses granted for credit. [Tr. 572-73]. Neither view is necessarily correct, although Dr. Sybouts subscribes to the broader view shared by Westside's educators: he defines curriculum to include "all the school-related experiences provided for the growth and devel-

opment of pupils," including the "school's activities programs." [J.A. 416-17].

Dr. Sybouts views the Equal Access Act[13] as incorporating a narrower view of curriculum. As he reads the Act, Subsurfers, for example, would be curriculum related because it relates to Physical Education courses.[14] Other clubs, Interact or Student Forum, for example, which do not on their face relate to specific courses, would not. [J.A. 409-11]. Dr. Sybouts, however, admitted that this was a "hard line to draw," [J.A. 409], and several purportedly

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[13] Dr. Sybouts' opinion was based in part on Equal Access guidelines prepared by a variety of nongovernmental organizations after the Act's passage. [J.A. 410]. It was a guide for schools, not an authoritative construction of the Act. See 130 Cong. Rec. H.14,473 - 14,476 (daily ed. Oct. 11, 1984).

[14] Under this view, National Honor Society would also be curriculum-related because admission to it depends on academic achievement. [J.A. 411].

noncurriculum clubs would be curriculum related if they advanced the goals and objectives of a specific course. [J.A. 413-16].

Thus he agreed that Student Forum would be curriculum related if designed "to help students develop a better understanding of our society and our government and how it works," [J.A. 414], and Interact would be curriculum related if the Sociology Department promoted "community service." [J.A. 414-16]. These are the goals and objectives of the School's Social Studies Department. [J.A. 444-46]. Therefore, even under Dr. Sybouts' opinion that the Act incorporates a narrower view of curriculum, the clubs in question are related to curriculum.

At trial, both sides also explored how an officially sanctioned Christian Bible Club might be perceived by students.

Dr. David Moshman, an expert in the area of child development and an advocate of extending broad First Amendment rights to children [J.A. 380-84], testified that, in his view, since children develop "formal operational reasoning" by the ages of 11 or 12, if a school made it clear that allowing a voluntary student group did not constitute school support for the group, high school students would understand this distinction. [J.A. 388, 397-400].

Dr. Moshman admitted, however, that "formal operational reasoning" continues to develop through adulthood [J.A. 389-90]; that children "differ greatly in how widely they apply it" [J.A. 390]; and that college-age students are generally more capable of formal operational reasoning because they have a greater wealth of experience. [J.A. 395].

The School's educators had a different opinion about the reasoning capabilities of their students. They explained that a Christian Bible Club at WHS would be perceived by some students as an endorsement of religion, particularly since the School encouraged club participation but had never permitted a club without faculty sponsorship. [J.A. 423-25, 435-37].

The District Court's Opinion

The United States District Court for the District of Nebraska entered judgment for the Board, finding that the School Board had not created a limited public forum in its student activities program:

> [T]hose clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution. The club system plan at WHS differs dramatically from those found to create an open forum policy in Widmar and Bender. [Pet. App. B 25-26].

The District Court also held that the Board's refusal to sanction the Christian Bible Club, although restrictive of speech, did not violate the students' freedom of speech because it was "reasonably related to [the] legitimate pedological concern," Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 571 (1988), that all sanctioned school activities present balanced views on controversial issues, a policy enforced with respect to both curricular and co-curricular activities. Moreover, the restriction was reasonable, since WHS students remained free to engage in non-sanctioned religious speech on school premises.

The Court of Appeals' Opinion

The Eighth Circuit reversed. It did not hold the District Court's finding that the student activities program at WHS was

a closed forum "clearly erroneous." Nevertheless, without explaining which clubs (other than the chess club) were "noncurriculum related" or offering any justification for rejecting the School officials' explanation of curriculum relatedness, the Court concluded that "many of the student clubs at WHS, including the chess club, are 'non-curriculum related.'" [Pet. App. A 14].[15]

The Eighth Circuit also rejected the Board's argument that the Act unconstitutionally established religion. [Pet. App. A 14-16]. It noted that the Act tracked Widmar v. Vincent, 454 U.S. 263 (1981), and that the only question was

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[15] The Court cited excerpts of the Act's legislative history suggesting that the definition of "noncurriculum related" meetings was intended by Congress to be "fairly broad." The definition of curriculum relatedness urged by school officials would, the Court wrote, allow the Act to be overturned by administrative fiat. [Pet. App. A 14-15].

whether high school students were as capable as college students of distinguishing school sponsored from school tolerated activities. The Court adopted as its own Congress' determination that there was no legally relevant difference between high school and college students.

SUMMARY OF ARGUMENT

Three primary issues are presented by this case: first, whether the First Amendment free speech rights of the students have been violated by reason of the refusal of WHS to permit the Christian Bible Club; second, whether the student clubs at WHS trigger the applicability of the Equal Access Act; and third, if the Equal Access Act is applicable, whether it violates the Establishment Clause by requiring WHS to officially sponsor the

Christian Bible Club because WHS officially sponsors other co-curricular clubs.

WHS, like other public high schools, is not a traditional public forum for purposes of free speech constitutional analysis. The more difficult question is whether WHS is a limited open forum or a closed forum. The appropriate focus of this question is the club program at WHS--the forum to which the students seek access. In this context, the club program at WHS constitutes a closed forum, as found by the Trial Court. WHS has not opened its club doors for public discourse. Rather, it has maintained its authority and control over access to that forum, limiting such access to student clubs which are officially sanctioned by WHS and which operate, by policy and practice, under the direct control and supervision of School officials.

WHS controlled the club forum as part of its educational program. WHS has a legitimate pedagogical reason for determining that it should avoid the appearance of religious partisanship and the attribution to it of religious speech.

Perhaps recognizing the inherent difficulties in seeking access to the forum that actually existed, the students seek transformation of the forum and access to that forum, as transformed. Instead of a true sponsorship for which WHS faculty members were responsible and accountable, the students sought access without a sponsor or, if required by WHS, a faculty member who would serve only in the capacity of a monitor. The students sought a forum as contemplated by the Equal Access Act and as was presented in Widmar, but such a forum was not to be found at WHS.

The clubs at WHS are not noncurriculum related under the Equal Access Act. Rather, they all are directly related to the core curricula. The environment at WHS is first defined by its missions and goals, which are then carried out through the educational program. This educational program is comprised of structured classes and structured (although to a lesser degree) co-curricular clubs and activities. The nonexistence of noncurriculum-related clubs definitionally precludes a finding of a limited open forum under the Equal Access Act. Accordingly, the Act is not applicable under the facts of this case.

The construction of the Equal Access Act urged herein is a correct interpretation of the plain language of the statute, accurately reflects its legislative history, and avoids the

Establishment Clause problems if the Act was applied to require WHS to officially sanction the Christian Bible Club.

The students sought WHS endorsement of the Christian Bible Club and its inclusion within the WHS programs and activities. This union of state and religion contradicts the fundamental premise of the Establishment Clause. The WHS student activities program is not only capable of being viewed as government speech -- it is government speech. The high degree of sponsorship, direction, and control of student clubs at WHS would constitute the advancement of religion by reason of sanctioning the Christian Bible Club and would become excessively entangled in religious matters relating to that club, in violation of the second and third programs of the Lemon test.

The students' insistence on official endorsement of their Christian Bible Club means that recognition of that club would construct an impermissible relationship between church and state, without regard to the age and maturity of high school students. Therefore, the impressionability issue need not be reached.

ARGUMENT

Student clubs are an integral part of WHS' educational program, not recreational activities whose sole relation to the School is physical presence in its building. Neither the Constitution nor the Equal Access Act requires School officials to restructure their student activities program in order to incorporate a religious club.

I

WHS IS NOT A TRADITIONAL PUBLIC FORUM

A public high school is not a traditional public forum. Hazelwood School Dist. v. Kulhmeier, 108 S.Ct. 562, 567 (1988). Students have no "absolute constitutional right to use all parts of a school building . . . for . . . unlimited expressive purposes." Graynerd v. City of Rockford, 408 U.S. 104, 117-918 (1972).

Hazelwood notwithstanding, the students claimed below that WHS was a traditional public forum because "its facilities [were open] to the public at large for participation in class and student activities." [Appellants' Brief at 15]. In support of this surprising contention, the students noted that non-students used school swimming, scuba diving, and weightlifting facilities.

[J.A. 158-59], 167-68, 236-38]. The Boy Scouts and the Fellowship of Christian Athletes were permitted in the past the use of the gym-nasium after school hours. [J.A. 360, 455-61]. Public officials and outside groups were occasionally invited to address classes or assemblies. Contro-versial topics were regularly discussed in classrooms. [J.A. 95-99, 126-27, 278-80, 321-22, 451, Tr. 480-81].

The primary purpose of a public forum is "assembly, communicating thoughts between citizens, and discussing public questions." Hague v. C.I.O., 307 U.S. 496, 515 (1939). The evidence marshalled to prove the existence of a traditional public forum falls woefully short of meeting this standard.

Much of the evidence presented by the students related to nonspeech activities. Since a traditional public forum is a

place exemplified by and defined in terms of unrestrained speech, Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, (1985), only proof that unrestrained speech takes place is relevant to the existence of a traditional public forum. And not every human activity is speech. Texas v. Johnson, 109 S.Ct. 2533 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 300 (1984) (Burger, J., concurring).

Weightlifting and scuba diving are athletic activities, not speech. Neither one conveys an idea or communicates any message. A swim protesting the deteriorating ocean environment might be speech. Texas v. Johnson, 109 S.Ct. at 2539-40. Ordinary recreational swimming is not. Its presence at WHS, and the presence of other nonspeech activities, is irrelevant

to the existence of a traditional public forum.

Nor can the existence of a traditional public forum be premised on WHS' occasional invitation to public officials or outside organizations to address students on matters related to the curriculum. [J.A. 41, 356-57, 451]. Public schools may encourage students to debate issues of public concern. They may also transmit community values, a responsibility at times inconsistent with the encouragement of debate and free inquiry. Board of Educ., Island Trees U. Free School Dist. v. Pico, 457 U.S. 853 (1982); Keyishinian v. Board of Regents, 385 U.S. 589 (1969). Balancing these sometimes conflicting functions is the task of democratically elected school boards.

Some parents and students may disagree with WHS' invitation to Planned

Parenthood to discuss birth control or the views expressed by invited public officials. Nonetheless, a school may deputize Planned Parenthood to teach about birth control or a public official to speak about problems confronting the community without incurring a reciprocal constitutional obligation to provide a platform for each and every group and individual wishing to reach students.

A public school which prepares its students for the responsibilities of citizenship in a democracy by encouraging debate and free inquiry (particularly in a structured setting) is not permitting use of its property for unrestrained speech purposes. On the contrary, it is preserving its property for its intended governmental use.

II

WHS'S SCHOOL ACTIVITIES PROGRAM IS NOT A LIMITED PUBLIC FORUM

A. The Appropriate Focus Is The Club Program

Limited public forum analysis focuses "on the access sought by the speaker," Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. at 801, not on the entity of which the forum is a part. In Cornelius, the Combined Federal Campaign, not the federal workplace, was the forum to which access was sought. This Court tailored its review of the evidence accordingly.

The forum to which the students seek access is WHS' activity program. Evidence about the after-hour's use of the gymnasium or the formal academic program in the classrooms is irrelevant to determining whether the student activities

program constitutes a limited public forum.[16]

B. The Trial Court's Finding Of A Closed Forum Was Correct

A limited public forum is not created by "inaction or by permitting limited discourse but by intentionally opening a nontraditional forum for public discourse." Cornelius v. NAACP Legal Defense Fund, Inc., 473 U.S. at 802; Perry Education Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). The bare fact of speech does not create a limited public forum. Nevertheless, if government tolerates enough unrestrained speech, a bare formal declaration of a closed "forum"

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[16] The students asserted below that, aside from a right of access under the Act, they had a constitutional right of access. The District Court unambiguously rejected this claim. [Pet. App. B 25]. It is unclear from its opinion whether the Court of Appeals decided this issue. [Pet. App. A 9-15]. Its citation to Widmar v. Vincent as dispositive without regard to the Act confirms that it decided both issues. [Pet. App. A 20].

will not serve to defeat recognition of a limited public forum. Id., 460 U.S. at 48.

A de facto limited public forum will not be readily inferred. In Perry, for example, access to an internal school mail system by community groups, including the Cub Scouts, YMCAs, and parochial schools, was insufficient to create a limited public forum so that a labor union also had to be allowed access. 460 U.S. at 47-48.

Crucial to the result in Perry was the conditioning of access on approval by school officials. The creation of a limited public forum is inconsistent with empowering a gate-keeper to determine who may have access. Conversely, the exercise of authority by a gate-keeper to determine which speakers will be given access demonstrates that a limited public forum has not been created. Cornelius v. NAACP

Legal Defense & Educ. Fund, Inc., 473 U.S. at 803-04 (regulation requiring advance approval of groups seeking access defeats limited public forum claim); Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct at 569 (prepublication review of high school newspaper).

Because the gate-keeper in Perry functioned as a substantial barrier to access, no limited public forum existed. "[P]ermission was [not] given as a matter of course so that what appeared to be a barrier to access in theory is not such in practice." 460 U.S. at 47.

The District Court correctly applied these principles to WHS' student activities program and found that the program was not a limited public forum. "Clearly the facts do not establish that WHS has a policy in practice of 'indiscriminate use' of its facilities by student organizations

or the general public." Pet. App. B 25. Without setting aside this and supporting factual findings as clearly erroneous, the Court of Appeals found Widmar v. Vincent, 454 U.S. 263 (1981) dispositive of the limited public forum issue.[17]

Perry and Cornelius teach that the existence of a limited public forum depends on a showing of intent to permit unrestricted speech. Questions of intent are questions of fact, subject to the clearly erroneous rule. Anderson v. City of Bessemer City, 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

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[17] The Court of Appeals explained only that, under the Act, a limited public forum existed because at least one non-curriculum club (the chess club) was recognized [Pet. App. A 19-20]. Even if that description of the chess club as noncurriculum related is accurate, Perry plainly holds that an occasional grant of access, without more, does not call a constitutional limited public forum into being. See n.23, infra.

The Court of Appeals erred in setting aside the District Court's finding that the student activities program was not a limited public forum without explaining why that court's factual finding that School officials had created a closed forum as part of the School's overall educational program was clearly erroneous. That the Court of Appeals might disagree with the educational justifications for one or more of the clubs does not suffice to demonstrate an intent on the part of School officials to open the activities program to unrestrained speech.[18] A

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[18] Widmar is easily distinguishable. College officials there could not credibly claim, as the trial court found WHS could, that their student activities program was part of the curriculum. The club program in Widmar made no pretense of being part of the school's educational program. Similarly, in Bender v. Williamsport Area School Dist., 563 F.Supp. 697 (M.D. Pa. 1983), rev'd, 741 F.2d 538 (3rd Cir. 1984), rev'd on other gds, 475 U.S. 534 (1986), no claim was made that the "activity period is a program-related function of the school." 563 F.Supp.

finding that the asserted educational justification was pretextual would suffice, but the Court of Appeals made no such finding, and no such finding could be supported by the record.

The District Court's findings were not erroneous at all, much less clearly so. They rested on WHS' Policy 5610 regulating the student activities program and on the uncontradicted testimony by School officials about the consistent administration of that program.

Although the idea for a club may come from students or administrators, the clubs themselves do not function independently of the School but "are part of the total education program as a means of developing citizenship, holesome attitudes, good human relations, knowledge, and skills." [Policy 5610, Trial Exhibit 71, J.A. 488].

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at 707.

Clubs are "directly under the control of the school administration" and "shall function for the welfare and the best interest of the students and the school." Id.

Three successive principals of WHS (two of whom now hold higher positions in the School system), and the current director of student activities testified uniformly to their understanding of Policy 5610 and their belief that all clubs in the student activity program were curriculum related. [J.A. 220, 362]. The trial court accepted their testimony that Policy 5610 was understood for almost 30 years to require School officials to determine whether a proposed club would further WHS' educational goals and mission before allowing it to function as part of the student activities program. [J.A. 241, 290-93, 343-44, 358-60].

Approval of proposed clubs by School administrators was not automatic. Actual practice reflected the unwritten understanding of School officials. Clubs were rejected because they served no useful function, served too few students, or conflicted with WHS' "goals and mission." [J.A. 241-42, 293-94, 357, 363, 367]. For example, a proposed "Dungeons and Dragons" club was rejected as inconsistent with school values. [J.A. 367].

In keeping with the view that student activities were an integral part of the WHS educational program, School officials required student clubs to present controversial subjects in a balanced way. [J.A. 245-58]. Political or religious clubs, which by their nature School officials could not require to provide balance, could not be recognized as student activities. [J.A. 488, Trial

Exhibit 71]. Indeed, the requirement of balance is inconsistent with the type of unrestrained speech characterizing a limited public forum.

Moreover, every student club was required to have a sponsor who was not present only to preserve order, the sole function of teacher monitors in most litigated equal access cases[19], but with development of club goals and objectives, insuring a club's compatibility with the "goals and mission" of WHS and its balance in regard to controversial issues. [J.A. 239, 250-51, 298-99, 311, 426, 441-43].

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[19] See, e.g., Bender v. Williamsport Area School Dist., supra, 563 F.Supp. at 700, n. 5; Lubbock Civil Liberties Union v. Lubbock Ind. School Dist., 669 F.2d 1038, 1047 (5th Cir. 1982); Bell v. Little Axe School Dist., 766 F.2d 1391, 1400 (10th Cir. 1985). Teachers in Garnett v. Renton Area School Dist., supra, like teachers in WHS, were required to maintain the substance of the clubs activities. As the Ninth Circuit recognized, that fact was of substantial relevance in determining that Renton's schools were not limited public forums.

Some clubs did not require as much faculty control and direction as other clubs. [J.A. 251, 272-73, 370-71]. Some sponsors were not always as diligent as School officials might have wished, but School officials were clear about what they demanded--active participation and leadership by sponsors to direct and control clubs in the activities programs. [J.A. 259-62, 294-96, 322-23, 374-75].

These restrictions on student activities were not a lingering vestige of a time when school officials ran schools with little regard for the abilities or rights of students. [J.A. 354]. The decision to maintain a student activities program as part of the curriculum so as to provide a "supervised learning experience for . . . students," Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. at 569, was the product of a conscious educational

decision, which was made not in reaction to the passage of the Equal Access Act, but made and practiced for many years prior.

The students' own expert, Dr. Ward Sybouts, testified that WHS' policy reflected a legitimate and well-accepted view of the proper role of student activities. Griffin, Student Activities in the Middle School: What Do They Contribute, N.A.A.S.P. Bulletin (April 1988) at 87. Indeed, he admitted that it was his own view. [J.A. 406-08, 416].

In short, far from being clearly erroneous, the District Court's finding that the clubs were part of the School's educational program accurately describes WHS' student activities program.

C. WHS Has Legitimate Pedagogical Reasons For Refusing To Recognize A Christian Bible Club

Over and apart from the Establishment Clause (see Point IV, infra), School officials may deny students access to a platform created by the School when student speech may be "erroneously attributed to the School" or when it might "associate the School with any position other than neutrality on matters of political controversy,"[20] provided that decision is "related to legitimate, pedagogical concerns." Hazelwood, 108 S.Ct. at 571. The stricter scrutiny applied to restrictions on student speech in Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969) is applicable only to

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[20] Given the special solicitude of the Establishment Clause for separating church and state in the public schools, Edwards v. Aguillard, 107 S.Ct. 2573, 2577 (1987), no lesser rule can be applicable to the need to maintain the appearance of religious neutrality.

private student speech, not speech from a school provided platform.

By Board Policy 5450, WHS tolerates private student speech, religious and otherwise. [Trial Exhibit 72, J.A. 489]. Students and administrators both testified that no effort was made to interfere with informal religious fellowship or prayer meetings. [J.A. 105-06, 128-30, 135-36, 140, 176, 193-94, 203-04, 426-28, 493]. Religious speech at WHS was not rooted out and suppressed, Stalinist style. This case, then, is not about whether religious speech may be suppressed, but whether, in pursuit of a legitimate pedagogical program, School officials may decline to incorporate into a student activities program [J.A. 252] a religious club with an agenda including proselytizing.

Avoiding the appearance of political or religious partisanship is a legitimate

justification for denying access to a nonpublic forum. Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985); Greer v. Spock, 424 U.S. 828 (1976); Lehman v. Shaker Hts. Rapid Transit, 418 U.S. 298 (1974). WHS' interest in avoiding identification with a religious club is no less significant than the CFC's interest in avoiding entanglement with controversial advocacy groups, or the military's or transit authority's interest in avoiding political partisanship.[21]

School officials also testified that the creation of a limited public forum, with a concomitant right of access by

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[21] In those cases, the entity's interest was a matter of policy. WHS, in contrast, has a legal duty to avoid "plac[ing] the government's weight behind an obvious effort to proselytize on behalf of a particular religion." Allegheny County v. Greater Pittsburgh ACLU, 109 S.Ct. 3086, 3137 (1989) (Kennedy, J., concurring and dissenting); Edwards v. Aguillard, 107 S.Ct. at 2577.

groups of all stripes, including, for example, the Ku Klux Klan, Black Panthers, or clubs like Dungeons and Dragons, would amount to a betrayal of the trust parents place in WHS. When it comes to assuring a pedogogically sound environment, parents understandably do not have the same confidence in the desires of their children's peers, and particularly those fronting for adults committed to a program of indoctrination, as they do in school officials. For this reason, and not due to hostility to religious viewpoints, School officials expressed the view that it would be preferable to narrow or partially close the activities program rather than allow a religious club to function in a limited public forum. [J.A. 493-94].[22]

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[22] Cornelius and Perry hold that, in a nonpublic forum, viewpoint discrimination is prohibited. No such discrimination exists at WHS. The refusal to recognize the Christian Bible Club was not intended

D. **The Christian Bible Club Would Radically Restructure The Forum**

A school-appointed sponsor cannot control or encourage the activities of a student religious club, Engel v. Vitale, 370 U.S. 421 (1962) as sponsors of other student activities must. Recognizing this, the Christian Bible Club offered to forego its "right" to a sponsor.

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to suppress Christianity or religion in general. The same rule applied to all groups which advocate an ideology; indeed, the denial of the privilege of recognition extended to even non-ideological groups which did not further the "goals and mission" of WHS. Dr. Findley testified without contradiction that religious and nonreligious clubs not admitted to the official program were treated alike. [J.A. 452-54]. As in Cornelius, the distinction between recognized and nonrecognized groups, based in part on a criterion of nonpartisanship, in not per se viewpoint discrimination. Moreover, officials told students that they could continue to meet at School as they had in the past. School officials volunteered to facilitate a meeting place in a neighboring church. [e.g., J.A. 82-84]. These facts are impossible to reconcile with viewpoint discrimination against Christianity or religion in general.

There is far less to this offer than meets the eye. In waiving the right to a sponsor, the students dispense with a burden many, if not most, clubs would be happy to discard. Because a religion club cannot be "more equal" than secular clubs under an equal access theory, acceptance of the waiver to the right to a sponsor would require School officials to eliminate the sponsor for all clubs at WHS. That change would substantially alter the nature of the activities program. The free speech right to equal access for religious clubs recognized in Widmar v. Vincent, 454 U.S. 263 (1981), and relied on by the students, is one of access to, not transformation of, a forum. Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., 460 U.S. at 48.

III

WHS HAS NO NONCURRICULUM RELATED CLUBS FOR PURPOSES OF THE EQUAL ACCESS ACT

The Eighth Circuit determined in rigid and mechanical fashion that WHS had a limited public forum under the Equal Access Act.[23] Its reasoning took the form of a syllogism: chess clubs were cited in the Congressional debate as exemplifying noncurriculum-related clubs, creating a limited public forum; WHS had a chess club; therefore, WHS had a limited public forum for purposes of the Act. [Pet. App. A 14].

The court did not otherwise define the statutory phrase "noncurriculum

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[23] The Act as enacted deleted a proposed section creating a private right of action. The existence of a private right of action was not raised below, and the Eighth Circuit did not pass on it. The Third Circuit has held that the Act does create one. Student Coalition for Peace v. Lower Marion School Dist., 776 F.2d 431 (3d Cir. 1985).

related." Nor did it explain why, or even if, it found "clearly erroneous" the trial court's contrary factual finding that all WHS clubs are curriculum related and tied to the educational function of the School. [Pet. App. B 25-26].

The District Court did not read the statute as creating an independent federal definition of noncurriculum relatedness. Instead, it understood the statute to require an analysis of a school's explanation of its curriculum and of why particular clubs are considered to be related to that curriculum.

To determine whether the Act is triggered by a noncurriculum-related club requires resolution of several related questions: (1) whether the Act prescribes a uniform federal definition of the curriculum or whether it defers to the policies of local schools; (2) under

either possibility, whether judges should apply the definition de novo, or whether they should accord substantial deference to the views of School official; and (3) how close the fit must be between the curriculum and the activities of a club.

The Act does not explicitly address any of these questions. The answers lie in the Act taken as a whole. Contrary to the position of the Eighth Circuit, which would have all of these questions answered by the federal judiciary applying a rule construing curriculum-relatedness quite narrowly, it is clear that the Act contemplated only a limited federal role (both for the Executive and Judicial Branches) in determining educational policy.

A. **The Act Balances Three Concerns**

Three policies are embodied in the Equal Access Act: the free speech rights

of students; the nonestablishment of religion; and the autonomy and discretion of local School officials. The rights of students are manifest in the ban against content discrimination among noncurriculum-related clubs, religious and secular. The Establishment Clause concerns, discussed in greater detail below (Point IV, infra) led to inclusion of several sections dealing with the special problems created by religious clubs; the autonomy of local School officials likewise received sustained and sympathetic attention from Congress.

From the beginning, equal access proposals were modeled on the limited public forum concept applied to college-level religious clubs in Widmar v. Vincent.[24] The first equal access

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[24] Congress twice used the term of art "limited public forum" in describing the situation to which the Act's nondiscrimination principle applied. 20 U.S.C.

proposals simply required school districts having a general policy of allowing student clubs to meet during "noninstructional" periods to allow religious clubs to meet as well. Failure to comply led to a cutting off of federal funds.

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§4071(a) and (b). When Congress uses a term-of-art whose meaning is well settled, "it is presumed, absent an express statement to the contrary, that Congress intended to adopt the interpretation placed on that concept by the Courts." Davis v. Michigan Dep't. of Treasury, 109 S.Ct. 1500, 1506 (1989). Since no constitutional limited public forum exists at WHS, none should exist for purposes of the Act either. Section 4071(b) states that a limited public forum exists when a school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises." This obscure language was introduced as part of the last minute substitute language. Note 26 infra. The "one or more" language is, nevertheless, not a departure from the principles of Perry. The legislative history, 130 Cong. Rec. S. 834 (daily ed. June 27, 1984) (remarks of Senator Leahey) makes clear that change was intended to make clear that the key question was not whether a school said it had a closed forum but whether it in fact had one. That is entirely consistent with Perry, 460 U.S. at 48.

Nonreligious speech was not protected by the early proposals. See, e.g., S. 1059, 98th Cong. 1st Sess. (1983); H.R. 2732, 98th Cong. 1st Sess. (1983); H.R. 4172, 98th Cong. 1st Sess. (1983). Opponents expressed concern that, as drafted, the legislation injected the federal government too far and too drastically into matters traditionally and best left to school boards.

In response to these concerns, several sections were added. One prohibited cutting off federal funds as a sanction for violating the Act, 20 U.S.C. § 4071(e), and another provided that schools retained authority to prohibit "meetings . . . otherwise unlawful." 20 U.S.C. § 4071(f).

The early bare-bones language was also rewritten to make explicit that school officials remained free to decide

whether to create a limited public forum. As a House co-sponsor, Representative Goodling explained:

> [T]he bill only applies if the school voluntarily creates a limited open forum. Everything is left to the local option. Everything is left to the local administration and the local school board.

130 Cong. Rec. H 7732 (daily ed. July 25, 1984).[25] In light of this concern for preserving local educational control, it is hardly surprising that the statute, which defines several other key phrases (see 20 U.S.C. § 4072), fails to define "noncurriculum-related."

In the American political tradition, the task of defining curriculum is entrusted to local, not federal, authority. Board of Educ., Island Trees School District v. Pico, 457 U.S. at 63-

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[25] Representative Goodling was the senior minority member of the House Education and Labor Committee and served as floor manager of the bill.

64; Epperson v. Arkansas, 393 U.S. 97 (1968); 20 U.S.C. § 953(c) (National Endowment for the Arts may not control curriculum); 20 U.S.C. § 3403(c) (same as to Department of Education). Congress' failure to provide a uniform federal definition of curriculum-relatedness, given both the larger political tradition and the specific concerns expressed in connection with the Act, reflects a deliberate decision to allow local school officials to employ a local definition of curriculum, subject only to judicial review to insure against abuse.

The Senate floor debate supports this construction of the Act. Senator Hatfield, Senate sponsor[26] of the language

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[26] The present Equal Access Act took the form of the Denton-Hatfield Amendment No. 3152, introduced in the Senate on June 6, 1984, as an amendment to S.1059, already reported to the floor by a Senate Committee. 130 Cong. Rec. S.6651 (daily ed.). It was debated in the Senate on June 27. 130 Cong. Rec. S.8331-8372.

which was ultimately adopted, emphasized in a colloquy with Senator Gorton that school boards had to decide which clubs were curricular:

> Mr. Gorton: Would the school district have full authority to determine whether the line is to be drawn between curriculum-related activities and noncurriculum related?
>
> Mr. Hatfield: We in no way seek to limit that discretion.
>
> Mr. Gorton: So if the school district were to determine that the girl's cheerleading squad, for example, should be led by a teacher, it could make the determination that it was curriculum-related.

Several changes were made in the amendment between the time of the substitutes' introduction on June 6 and the debate on June 27. These were introduced as a perfecting amendment on the 24th. 130 Cong. Rec. S.8338 (daily ed. June 24, 1984). The House, having failed to adopt an earlier version of the Act, 130 Cong. Rec. H.3855 - H.3879 (daily ed. May 15, 1984), ultimately accepted the Senate's version on July 25. 130 Cong. Rec. H.7723 - H.7745 (daily ed.).

The Senate debate is by far more comprehensive. The House considered the bill under a suspension of the rules, allowing only for one hour of debate, 130 Cong. Rec. H.7723 - H.7740 (daily ed. July 25, 1984). Most of that debate consisted of set speeches on the First Amendment.

Mr. Hatfield: Correct.

Mr. Gorton: And, therefore, the existence of that group would not be a nonrelated forum?

Mr. Hatfield: Correct.

Mr. Gorton: Could the school make the same determination with reference to a chess club?

Mr. Hatfield: I would not say that no school official could, but I cannot readily conceive of a criterion at this time that could be used to establish that as a curriculum-related activity . . . 130 Cong. Rec. S.8342.

The Court below cited only an earlier portion of this exchange in which Senator Hatfield expressed the unequivocal view that a chess club was not curriculum related. Id. Accordingly, it held that the existence of a chess club at WHS conclusively proved the existence of a limited public forum. That reasoning takes Senator Hatfield's views wholly out of context and ignores the larger thrust of his remarks and the statutory framework as a whole.

The Court of Appeals construed the statute in this artificial way because it feared that allowing each local school board to define its curriculum would allow the Act "to be easily circumvented by administrative decree." [Pet. App. A 14].

Plainly, school officials cannot evade the Act with sham claims of curriculum relatedness. But "Courts are capable of distinguishing a sham," Wallace v. Jaffree, 473 U.S. 38, 75 (1985) (O'Connor, J., concurring), without having to substitute their own judgments for that of school officials. Local control of education ought not to be discarded on the off-chance that some fraudulent claims will not be detected by a federal court.

Since "noncurriculum-related" is not defined in the statute itself, yet under the views of the court below it is not a decision to be made locally, school

administrators are left without guidance to determine whether a school has a limited public forum. Other than the few clubs cited in the legislative history as noncurriculum-related (indeed, only chess club was so cited), school officials attempting to comply with the Act would have no way of knowing, short of litigation, which of their clubs are curriculum-related.

Judges are not well-situated by training or experience to make de novo judgments about educational policy. And reliance on the legislative history alone is inappropriate. Legislators are not educators, and they can be and are often wrong about what is curriculum-related. Moreover, the Court of Appeals' approach of mechanically applying the legislative history freezes certain clubs into a noncurriculum-related status merely

because Congress (or some members of Congress) thought in 1984 that they were not related to the curriculum. Computers may have been unrelated to the curriculum when the authors of this brief went to school; they are curriculum-related now. Chess, to take another example, is increasingly considered a game that teaches logic, strategy, and planning for alternatives, yet some members of Congress thought it unrelated to the curriculum.

The alternatives are not as stark as the Eighth Circuit thought. It is possible to allow school districts substantial leeway to define the curriculum and yet police against invasions of the federally protected rights of students.

The correct standard was enunciated by the Ninth Circuit in Garnett v. Renton School Dist., 874 F.2d 608, 614 (9th Cir. 1989). That court held that the Equal

Access Act "does not expressly depart from th[e] principle of deference to the judgment of school officials" generally binding on the federal courts. 874 F.2d at 614. On the other hand

> while we accord some deference to a school district's determination about whether a group is curriculum related, we cannot completely defer to a school district's determination. Complete deference would render the Act meaningless because school boards could circumvent the Act's requirement simply asserting that all student clubs are curriculum-related.

In view of these conflicting principles, the Ninth Circuit held that definition of the curriculum is primarily a local responsibility but not one without limits in this context. In enacting the Act, Congress did not claim the task of defining curriculum for itself, or assign it to federal judges. The Eighth Circuit unnecessarily trammeled on the authority of WHS officials when it arrogated to

itself the decision de novo whether certain clubs were curriculum-related.

B. WHS' Clubs Are Curriculum Related

The statute also does not spell out how close the fit must be between the curriculum and a club for it to be curriculum-related.[27] For Senator Hatfield, clubs which were "an extension of the classroom" were curriculum related. 130 Cong. Rec. S.8342 (daily ed. June 27, 1984). In the House, a more elaborate test was suggested by Representative Goodling:

> First, is the subject matter of the meeting of a type which a public school could sponsor? In other words, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and school band would all clearly fall within this category. A

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[27] The respective committee reports, addressed to earlier versions of the legislation, do not address any of the questions discussed in the text. S. Rep. No. 98-357, 98th Cong., 2d Sess. (1984); H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984).

> young Democrat or Republican club, private social organizations, or religious groups would not be of the type which a school could sponsor.
>
> Second, does the school or a school teacher require or directly encourage student participation in such group in connection with curriculum course work?[28]

130 Cong. Rec. H.7732 (daily ed. July 25, 1984).

The ten clubs singled out in the pretrial order as allegedly noncurriculum related [J.A. 60], as well as the remaining 23 student activities [Trial Exhibit 63, J.A. 479], easily meet the first part of Representative Goodlings' test. None are of the type that a school is constitutionally forbidden to support.

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[28] Senator Hatfield may have had the second branch of Representative Goodling's test in mind when he said that athletic clubs are curriculum related because tax dollars may be expended on them. 130 Cong. Rec. S.8342 (daily ed. June 27, 1984).

In fact, WHS prohibits School sponsorship of political or religious groups.

Both the Senate's "extension of the classroom" and the House's "require or encourage participation" tests are easily met by WHS' activities program. WHS actively encourages participation in its entire student activities program. [J.A. 344, 435-436].

All recognized clubs participate in a "Club Fair" designed to acquaint students with the clubs that may interest them. Students are aggressively recruited on these occasions. [J.A. 101, 422,423, 430]. Homeroom advisors also inform students of clubs which might be of interest to them. [J.A. 36]. Community projects undertaken as part of Zonta or Interact are eligible for extra credit in sociology class. [J.A. 226]. Undoubtedly, the possibility of boosting a grade

"encourage" participation in the sense that Congress had in mind.

School officials, moreover, testified at length as to why each of the clubs claimed by the students to be noncurriculum related was in reality an extension of the classroom. The District Court found this testimony to be credible, and its findings were not and cannot be set aside as clearly erroneous.

Subsurfers, for example, functioned as an extension of the School's swimming program, in turn a part of the School's formal athletic program. Athletics are curriculum related.[29] WHS' athletic program was designed to acquaint students with activities such as swimming or scuba diving which, unlike competitive team

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[29] See, e.g., 130 Cong. Rec. S.8342 (remarks of Senator Hatfield); 130 Cong. Rec. 7732 (remarks of Representative Goodling (daily ed. July 25, 1984); S. Rep. 98-357, 98th Cong., 2d Sess. at 38 (1984).

sports, are likely to be pursued throughout adulthood. [J.A. 305-06].

Photography was no longer a club when this case was tried but a full-fledged class, part of WHS' extensive art department. It was treated as a club only so long as a state-certified photography teacher was unavailable. [J.A. 444-45]. Plaintiffs made no effort to prove that the club was not related to course work in the Art Department.

WHS has an extensive program of business courses, including accounting, marketing, and sales development. [J.A. 448-50]. WHS' Future Business Leaders of America ("FBLA") chapter rounded out this formal classroom instruction in business with programs emphasizing practical business skills and relating these "to school work and activities." [J.A. 354].

FBLA prepared students for careers in business, whether immediately "in the world of work or . . . going on to college." [J.A. 447-48]. School officials asserted that FBLA reinforced what students learned in the classroom about "entrepreneurship, free enterprise system . . . the overall global kinds of things they need to know if they're going to go into a business-related career," Id.[30]

Chess, too, contributed to academic performance in mathematics courses [J.A. 220-21, 304; Tr. 498], so much so that the math department at one time requested that chess be permitted in its resource room. That ultimately proved impracticable, and chess is now conducted

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[30] WHS was not alone in encouraging student's taking business courses to participate in this club. The Nebraska Department of Education urged all schools to encourage student participation in FBLA. [J.A. 448].

as a club which meets elsewhere.[31] [J.A. 443-444].

Zonta and Interact are not private social organizations, but community service clubs which serve to stimulate student interest and participation in community service projects. [J.A. 225-26, 288-89, 305-06].[32] School officials across the country now recognize that life-long commitments to community service cannot be left to the happenstance of private conscience [J.A. 437] but must be

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[31] WHS' view that chess contributes to performance in math, science, and computers is hardly idiosyncratic. Recent reports confirm that playing chess strengthens academic performance. N.Y. Times, July 19, 1989, p. C-5, col. 1.

[32] This Court has taken note of the quasi-public nature of Rotary and its commitment to community service. Board of Directors of Rotary Interr. v. Rotary Club, 479 U.S. 537, 546 (1987). In an amicus brief filed in that case, Zonta International described itself as an "international women's service organization" (Brief at 3) "quite similar" (Brief at 5) to Rotary.

nurtured by the public schools. See, e.g., Title I of the proposed National Community Services Act of 1989 (S.1430) providing grants for encouraging community service in the public school, especially when the program (§ 106[c][a][D]) is "integrated into the academic program . . ." Accord, Menacker and Wynne, Helping Students to Serve Society, Phi Delta Kappan (F.S. 1982) at 381. Zonta and Interact exemplify that approach while furthering the "goals and mission" of WHS to train good citizens. [J.A. 225-26]. Whatever social fraternization occurs in these activities (as well as in other clubs conceded to be curriculum related) is, from WHS' point of view, incidental to their curriculum-related purposes.

Two of the remaining clubs are not clubs in the ordinary sense. The National

Honor Society, as far as the students demonstrated, has no existence beyond its name. It is an academic honor, like dean's list or valedictorian. It would be entirely perverse, and it would enshrine anti-intellectualism into law, if the Act were construed to treat cheerleaders as curriculum related, as the legislative history indicates is the case (130 Cong. Rec. S.8342 daily ed. June 27, 1984) (remarks of Senator Hatfield), but not a group dedicated to honoring academic achievement.

Welcome to Westside is a buddy system for new students; it holds no meetings. [J.A. 201]. WHS educates 1,450 students. New students can easily get lost in so large an institution. WHS has an interest in informing new students where various services and classes may be found and which administrators or guidance

counsellors can resolve particular problems. It also has an interest in easing the social integration of new students. [J.A. 305, 328-29].

Some of these tasks might be performed by School personnel, but it is surely reasonable for School officials to conclude that students can do it at least as well, if not better. Since WHS has as one of its "goals and mission[s]" teaching students that they have a responsibility to their community, it is entirely reasonable for School officials to assign these tasks to students. Welcome to Westside is not a vehicle for student speech but for furthering institutional needs.

The remaining activities alleged by the students to be noncurriculum related are the Student Forum and the Student Advisory Board, which together comprise

the student government. According to School officials, student government reinforces the specific curriculum of the social studies department. [J.A. 270-73, 306, 445-47]. The "goals and mission" of WHS are to teach students the skills needed to participate in a democracy--the "role and purpose of the American public school system." Bethel School Dist. v. Fraser, 478 U.S. 675, 681 (1986).

Like Welcome to Westside, student government does not serve as a vehicle for self-expression; rather, it draws students into the operation of the School, gives them a stake in its success, and provides administrators with a vehicle for communicating with, and hearing from, students. As then Chief Justice Burger put it in Healy v. James, 408 U.S. 169, 195 (1972) (concurring opinion), "part of the educational experience of every

college student should be an experience in responsible self-government, and this must be a joint enterprise of students and faculty." (emphasis added).

IV

THE CONSTITUTION FORBIDS INCORPORATING A RELIGIOUS CLUB INTO AN OFFICIALLY SPONSORED STUDENT ACTIVITIES PROGRAM

The construction of the Act adopted by the Ninth Circuit in Garnett, and which we have urged upon the Court, is appropriate because it is a correct interpretation of the plain language of the statute and accurately reflects its legislative history. Moreover, construing the Act to allow substantial leeway to local school officials to define curriculum in accordance with local practice also has the substantial advantage of avoiding the Establishment Clause problems which would arise if the Act were applied, as it was by the Eighth

Circuit, to require WHS to welcome a religious club into its official student activities program. Public Citizen v. United States Department of Justice, 109 S.Ct. 2558, 2558, 2572-73 (1989). The constitutional issues are particularly grave here because the Act is sought to be applied to a school which permits informal religious speech, refusing only to lend that same speech its official approval.

A. The Students Seek Endorsement of Their Religious Club

The students made it clear beyond question that what they sought was not only the right to engage in religious speech (a right which was not denied them), but official recognition of their Christian Bible Club. This would entail equal treatment with all other school sponsored clubs [Pre-trial Order #13, J.A. 59], and include a right of access to school controlled mediums of

communication -- the loudspeaker, the school newspaper, and bulletin boards. [e.g. J.A. 107, 132, 155-56]. As one student put it in explaining why informal meetings were not adequate, "I'd want to be recognized as any other club that meets at school because otherwise I feel that it's discrimination." [Tr. 129].

The students seek, in other words, a judicial order requiring WHS to count among its "goals and mission" Christian fellowship and the evangelization of "non-religious" students [J.A. 252], or those students who "would like to become Christians and follow God" (as one student put it) [J.A. 185].

The student activities program at WHS does not exist separate and apart from the School; it is an integral part of the School's educational function. The School does not merely make space available for

student activities, it encourages participation in these programs, controls their activities, and rejects those activities which it regards as unreflective of the community values it espouses. The request for recognition of a Christian Bible Club is nothing less than a request for the School to incorporate religious activities into its official program, and thereby to have school officials endorse participation in the religious club and provide the club with an official platform from which students can reach non-religious students. [J.A. 285].

No citation of the authority is necessary to reject this unprecedented claim. A school cannot have as even one of its "goals" the reinforcing of religious beliefs among believers, or the spreading of the "Good News" of the Gospel

to non-believers. These are not within the legitimate "goals and mission" of any public school or of any government agency. What the students seek is a union of state and religion. It is precisely such a union which the Establishment Clause forbids. Grand Rapids School Dist. v. Ball, 465 U.S. 373 (1985); Larkin v. Grendels Den, 459 U.S. 116 (1982).

Since the students seek government sponsorship of religious speech, wrapping their claim in the flag of non-discrimination does not aid them. As this Court recognized unanimously in Widmar v. Vincent, 454 U.S. 269, 271, n.9 (1981), the Constitution itself requires discrimination between government sponsored secular and religious speech. More recently, this Court was even more forthright in rejecting an analogous claim, saying that it "contradicts the

fundamental premise of the Establishment Clause." County of Allegheny v. ACLU, 109 S.Ct. 3086, 3110 (1989).

Nor does Widmar support the students' right to have their religious club recognized by this School. The Court rejected the University's Establishment Clause argument in that case because the religious club would function in a public forum. Although title to a public forum rests with the government, those using the forum for speech are not doing so at the behest or sufferance of government, and the reasonable person does not understand speech in such a forum to enjoy government's approval. Speech in a public forum is not governmental speech, and, unless the forum is created primarily to facilitate religious speech, the Establishment Clause is not implicated.

At WHS, the student activities program is not merely capable of being mistaken for government speech. It is government speech. The Establishment Clause, therefore, would be violated by granting the students what they seek -- official endorsement of their religious views.

B. An Officially Sponsored Christian Bible Club Would Entangle the School With Religion

Given the structure of WHS' activity program, granting the student request for a Christian Bible Club would unduly entangle WHS with religion. Every club at WHS has a sponsor, who is far more than a glorified babysitter. The sponsor is charged with actively directing the activities of each group, guiding its student leaders, shaping its program, and ensuring balance in the presentation of

controversial ideas and conformity with the "goals and mission" of WHS.

Unless WHS were to modify its requirements for all clubs, or waive it on a preferential basis for the Christian Bible Club, the publicly appointed and paid sponsor would be charged with influencing and controlling the club's religious program.

The students thus seek to mandate "a kind of continuing day-to-day relationship" between church and state, Aguilar v. Felton, 473 U.S. 402, 414 (1985), thus setting up "[a] comprehensive, discriminating and continuing state surveillance" of religious activity impermissible under the Establishment Clause. Lemon v. Kurtzman, 403 U.S. 602, 619 (1973).

C. The Court Need Not Reach the Impressionability Issue

The students' insistence on school endorsement of their Club and the inevitable entanglement which would follow were their request granted, means that recognition of this particular Christian Bible Club would construct a relationship between church and state which is improper without regard to the age of the students and their impressionability.

It is therefore unnecessary to consider whether the trial court incorrectly credited expert testimony that, in theory, high school students are as capable as college students of understanding when a school is endorsing religion in the face of contrary testimony by school officials about the actual ability of WHS' students to make such distinctions, as well as caveats in the

expert's own testimony about the varying abilities of individual teenagers.

Nor is there any need to consider whether these findings are inconsistent with this Court's repeated holdings that secondary school students are more impressionable than college students. See, e.g. Edwards v. Aquillard, supra; Widmar v. Vincent, 454 U.S. at 274, n.14.

The construction of the statute we have urged would further avoid any inquiry into the legitimacy of a purported Congressional finding that high school students are not impressionable, a finding based on the testimony of not a single psychologist or expert in child development. The court below believed itself bound by that finding. (Pet. Cert. App. A-19-20). Yet that Congressional "finding" appears inconsistent with this Court's repeated contrary conclusions, and

may simply manifest Congressional defiance of lower court legal conclusions with which it disagreed. See Cert. Pet. at p. 18, n.5 and p. 21, n.7.

CONCLUSION

The claim for equal treatment for religious and secular speech is appealing. Perhaps a school which permits any club to meet, which tolerates Democratic, Republican, anarchist and Marxist clubs as part of its activity program, and which exercises little or no control over their activities, should be required to tolerate a Bible club. WHS is not that school, and what these students are complaining about are not obstacles to religious speech, but the School's refusal to lend them its prestige and endorsement.

For the reasons stated, the judgment of the Eighth Circuit should be reversed, and the judgment entered for the petitioners.

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IN THE

Supreme Court of the United States

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THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), et al.,

Petitioners,

v.

BRIDGET C. MERGENS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

I. DOES THE SCHOOL OFFICIALS' BAN OF A VOLUNTARY STUDENT-INITIATED BIBLE CLUB CONSTITUTE AN UNCONSTITUTIONAL INFRINGEMENT ON THE STUDENTS' FREE SPEECH RIGHTS AS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS?

- A. Do Public School Students Have First Amendment Rights of Freedom of Speech and Freedom of Association?
  - 1. Are Religious Discussion and Worship Forms of Speech Protected By the First Amendment?
- B. Can the Voluntary, Student-Initiated Bible Club Be Banned From the Club and Organization System at Westside High School?
  - 1. Is the Club and Organization System at Westside High School an Open Public Forum?
  - 2. Is the School Board's Content-Based Ban Justified By a Compelling State Interest?
    - a. Is the School Board's Ban Content Based?
    - b. Do School Officials Have a Compelling State Interest?
  - 3. Is the School Officials' Ban Narrowly Tailored?
- C. Is the School Officials' Ban of a Student-Initiated Bible Club Unconstitutional Because It Is An Effort To Suppress Expression Merely Because They Oppose the Students' Viewpoints?
- D. Is the School Officials' Ban of the Bible Club A Reasonable Time, Place and Manner Regulation?

II. DOES THE BAN OF A STUDENT-INITIATED BIBLE CLUB CONSTITUTE A VIOLATION OF THE STUDENTS' DUE PROCESS RIGHTS BECAUSE OF THE LACK OF OBJECTIVE STANDARDS AND PROCEDURAL SAFEGUARDS WHICH RESULTED IN THE SCHOOL OFFICIALS' EXERCISE OF ARBITRARY DISCRETION?

QUESTIONS PRESENTED – Continued

A. Did School Officials Exercise Impermissible Discretion In Refusing to Allow the Student-Initiated Bible Club To Meet On the Westside High School Campus?

B. Is the School Officials' Ban of the Student-Initiated Bible Club Void for Vagueness?

III. IS THE EQUAL ACCESS ACT CONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS?

A. Has Westside High School Established A Limited Open Forum Under the Equal Access Act?

B. Does the Equal Access Act Violate the Establishment Clause of the First Amendment?

1. Does the Equal Access Act Have a Secular Purpose?

2. Does Equal Access Have the Primary Effect of Advancing Religion?

3. Does an Equal Access Policy Foster Excessive Government Entanglement With Religion?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 8

ARGUMENT 11

I. THE SCHOOL OFFICIALS' BAN OF A VOLUNTARY, STUDENT-INITIATED BIBLE CLUB IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE STUDENTS' FREE SPEECH RIGHTS AS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS 11

A. Public School Students Have First Amendment Rights of Freedom of Speech and Freedom of Association 11

1. Religious Discussion and Worship are Forms of Speech Protected By the First Amendment 19

B. The Club System At Westside High School Is A Public Forum From Which A Voluntary, Student-Initiated Bible Club May Not Be Banned 19

1. The Club and Organization System at Westside High School Constitutes An Open Public Forum 19

2. The School Officials' Content-Based Ban Is Not Justified By a Compelling State Interest 21

TABLE OF CONTENTS – Continued

Page

a. The School Officials' Ban is Content Based 21

b. The School Officials Have Not Shown a Compelling State Interest..... 22

3. The School Officials' Ban Is Not Narrowly Tailored 25

C. The School Officials' Ban of a Student-Initiated Bible Club is Unconstitutional Because It Is An Effort To Suppress Expression Merely Because They Oppose the Students' Viewpoints 26

D. The School Officials' Ban of the Bible Club Is Not A Reasonable Time, Place and Manner Regulation 28

II. THE BAN OF A STUDENT-INITIATED BIBLE CLUB CONSTITUTES A VIOLATION OF THE STUDENTS' DUE PROCESS RIGHTS BECAUSE OF THE LACK OF OBJECTIVE STANDARDS AND PROCEDURAL SAFEGUARDS WHICH RESULTED IN THE SCHOOL OFFICIALS' EXERCISE OF ARBITRARY DISCRETION 29

A. The School Officials Exercised Impermissible Discretion..... 29

B. The School Officials' Ban of the Student-Initiated Bible Club Is Vague 31

III. THE EQUAL ACCESS ACT IS CONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS 33

TABLE OF CONTENTS – Continued

Page

A. Westside High School Has Established A Limited Open Forum Under The Equal Access Act 34

B. The Equal Access Act Does Not Violate the Establishment Clause of the First Amendment 40

1. The Equal Access Act Has A Secular Legislative Purpose..... 41

2. Equal Access Does Not Have the Primary Effect of Advancing Religion..... 42

3. An Equal Access Policy Does Not Foster Excessive Government Entanglement With Religion 46

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES:

Ambach v. Norwick, 441 U.S. 68 (1979) 26

Bates v. City of Little Rock, 361 U.S. 516 (1960) 15

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 24, 25, 45

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 16

Board of Airport Commissioners v. Jews for Jesus, 482 U.S. 569 (1987) 8, 19, 26, 33, 34

Board of Education v. Pico, 457 U.S. 853 (1982) .. 13, 45

Boos v. Barry, 485 U.S. ___, 108 S.Ct. 1157 (1988) 21, 25, 27

Broadrick v. Oklahoma, 413 U.S. 601 (1974) 32, 33

Brown v. Board of Education, 347 U.S. 483 (1954). 29, 35

Buckley v. Valeo, 424 U.S. 1 (1979) 32, 33

Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) 12

Cantwell v. Connecticut, 310 U.S. 296 (1940) 23, 46

Carey v. Brown, 447 U.S. 455 (1980) 9, 21, 25

Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985) 26, 27, 28, 30

Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) 28, 30

County of Allegheny v. American Civil Liberties Union, 492 U.S. ___, 109 S.Ct. 3086 (1989) 10, 25, 27, 43

Cox v. Louisiana, 379 U.S. 536 (1965) 22

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1985) 44

Edwards v. Aguillard, 482 U.S. 578 (1987) 23, 41, 43

Engel v. Vitale, 370 U.S. 421 (1962) 23

TABLE OF AUTHORITIES – Continued

Page

Epperson v. Arkansas, 393 U.S. 97 (1968) 18, 42

Everson v. Board of Education, 330 U.S. 1 (1947) 24

Frisby v. Schultz, 487 U.S. ___, 108 S.Ct. 2495 (1988) 28

Grayned v. City of Rockford, 408 U.S. 104 (1972) . 29, 32

Hazelwood School District v. Kuhlmeir, 484 U.S. ___, 108 S.Ct. 562 (1988) 6, 15, 19

Healy v. James, 408 U.S. 169 (1972) 8, 14, 15, 18

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 19, 28

Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489 (1982) 23

Houston v. Hill, 482 U.S. 451 (1987) 9

Hunt v. McNair, 413 U.S. 734 (1973) 42

Katzenbach v. Morgan, 384 U.S. 641 (1966) 44

Keyishian v. Board of Regents, 385 U.S. 589 (1967) 13

Kolender v. Lawson, 461 U.S. 352 (1983) 31, 32

Kovacs v. Cooper, 336 U.S. 77 (1949) 29, 34

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 47

Lemon v. Kurtzman, 403 U.S. 602 (1971) ...10, 22, 40, 41, 44

Lewis v. City of New Orleans, 430 U.S. 130 (1974) 31, 32

Lovell v. City of Griffin, 303 U.S. 444 (1938) 19, 20

Lynch v. Donnelly, 465 U.S. 668 (1984) 25, 40, 41, 42, 43

McDaniel v. Paty, 435 U.S. 618 (1978) 24

McGowan v. Maryland, 366 U.S. 420 (1961) 42

TABLE OF AUTHORITIES – Continued

Page

Mergens v. Board of Education, No. CV 85-0-426, Slip Op. (1988) (reproduced in Pet. For Certiorari: Appendix B-11) ..... *passim*

Mergens v. Board of Education, 867 F.2d 1076 (8th Cir. 1989) ..... *passim*

Meyer v. Nebraska, 262 U.S. 390 (1923) 11

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 44

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 14

NAACP v. Button, 371 U.S. 415 (1963) 25

New York v. Ferber, 458 U.S. 747 (1985) 9, 32

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 22

Niemetko v. Maryland, 340 U.S. 268 (1951) 19, 25, 29

O'Hair v. Andrus, 198 U.S. App. D.C. 198, 613 F.2d 931 (D.C. Cir. 1979) 46

Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37 (1983) 20, 26, 28

Plessy v. Ferguson, 163 U.S. 537 (1896) 29

Police Department v. Mosley, 408 U.S. 92 (1972) .. 22, 31

Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976) 42

TABLE OF AUTHORITIES – Continued

Page

Saia v. New York, 334 U.S. 558 (1948) 19

Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 28

Schneider v. State, 308 U.S. 147 (1939) 15, 19, 20, 29

School District v. Schempp, 374 U.S. 203 (1963) ... 23, 43, 45

Secretary of State v. Joseph H. Munson Co., 467 U.S. 947 (1984) 30

Shelton v. Tucker, 364 U.S. 479 (1960) 9, 13, 25

Shuttlesworth v. Birmingham, 394 U.S. 147 (1969) 20

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 20

Stone v. Graham, 449 U.S. 39 (1980) 23, 42

Texas Monthly v. Bullock, 489 U.S. ___, 109 S.Ct. 890 (1989) 10, 42, 43

Thomas v. Review Board, 450 U.S. 707 (1981) 18

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 8, 11, 12, 13, 15, 16, 18, 45

Tilton v. Richardson, 403 U.S. 672 (1971) 40

United States v. American Trucking Association, 310 U.S. 534 (1940) 34

United States v. Grace, 461 U.S. 171 (1983) 28

Wallace v. Jaffree, 472 U.S. 29 (1985) 25, 43

Walz v. Tax Commission, 397 U.S. 664 (1970) 46

TABLE OF AUTHORITIES – Continued

Page

Ward v. Rock Against Racism, 491 U.S. ___, 109 S.Ct. 2746 (1989) 21, 25

Wayte v. United States, 470 U.S. 586 (1985) 22

West Virginia State Board of Ed. v. Barnette, 319 U.S. 624 (1943) 13

Whitney v. California, 274 U.S. 357 (1927) 22

Widmar v. Vincent, 454 U.S. 263 (1981) ..... *passim*

Wisconsin v. Yoder, 406 U.S. 205 (1972) 21, 23

Zorach v. Clauson, 343 U.S. 306 (1952) 9, 24, 45

CONSTITUTIONS AND STATUTES:

U.S. Const. amend. I ..... *passim*

U.S. Const. amend. V 22

U.S. Const. amend. XIV 9, 11, 18, 23, 31, 33

Title 20 U.S.C. § 4071 ..... *passim*

Title 20 U.S.C. § 4072 ..... 3, 35

The 4-Way Test Of The Things We Think, Say Or Do (Rotary International, Evanston, Illinois) 27, 38

Hearing Before the Senate Committee on Judiciary on S.815 & S.1089, 98th Cong., 2d Sess., April 28, 1983 and August 3, 1983 at 37 44

S. Rep. No. 357, 98th Cong., 2d Sess. 43, 44

TABLE OF AUTHORITIES – Continued

Page

128 Cong. Rec. (daily ed. Sept. 17, 1982)

S11781 34

130 Cong. Rec. (daily ed. June 27, 1984)

S8332 ..... 10, 33, 34

S8335 34

S8337 33

S8340 34

S8342 ..... 36, 37, 38, 39

S8343 ..... 37, 39

S8348 47

S8355 ..... 33, 47

S8356 34

S8358 34

S8360 34

S8362 37

S8365 33

S8370 33

130 Cong. Rec. (daily ed. July 25, 1984)

H7730 33

H7732 37

H7734 ..... 33, 41

H7737 33

H7740-41 33

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 Nw. U.L. Rev. 1 (1986) 25

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Webster's Third New International Dictionary (1967) 36

Note, The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools, 92 Yale L.J. 499 (1983) 18

Note, Religious Expression On The Public School Forum: The High School Students' Right To Free Speech, 72 Geo. L.J. 135 (1983) 18

No. 88-1597

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OCTOBER TERM, 1988

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Petitioners,

v.

BRIDGET C. MERGENS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

Westside High School (WHS) is a public secondary school as defined by Nebraska State Law.[1] (J.A. 57). Located in Omaha, Nebraska, WHS is organized as part of the Westside Community School system, an independent public school district managed by the Board of Education of Westside Community Schools. *Id.* WHS receives federal financial assistance. *Id.* Respondents, Bridget C. Mergens, et al., are students at WHS who desire to form a voluntary student-initiated Bible Club. (J.A. 72, 116-17, 133). Had school officials allowed them to meet, the students envisioned using "any empty classroom in the morning or after school" on the WHS campus. (J.A. 78, 117). As proposed to school officials, the Bible Club meetings would have included Bible study, prayer and discussions of relevant topics in an effort to encourage personal and spiritual growth. (J.A. 73-77, 154-55, 185, 190). Christian fellowship, Bible reading, worship and prayer are a vital part of the daily lives of these students. (J.A. 75, 131, 163). The student-initiated Bible Club sought the same rights, privileges, terms and conditions accorded to other clubs at WHS. (J.A. 105, 109). Simply put, the students wanted equal treatment, nothing more, nothing less.[2]

The school board maintains WHS for the benefit of its students and it provides, by policy and practice, for the dissemination of a wide range of ideas to those required to

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[1] The School Officials and students, in a pretrial stipulation, agreed that WHS is a secondary school "as defined by the Equal Access Act." (Pretrial Order No. 2, J.A. 57). WHS served students in grades 10-12.

[2] Although the students wanted the same rights, privileges, terms and conditions as other clubs, they were willing to allow the school to make announcements in the school paper or the public address system to the effect that the school did not endorse the content of the Bible Club. (J.A. 73).

attend WHS.[3] Over thirty student clubs and activities are recognized by school officials at WHS.[4] (J.A. 479). Several of these clubs are not related to the school's curriculum. For instance, "Peer Advocates" is a "service activity" club at WHS that allows WHS students to work with handicapped students. Dr. Findley, Principal of WHS, testified at trial that "Peer Advocates" *is not curriculum* related:

> Q – Did Peer Advocates, when you were looking at it, relate to any of the required curriculum or elective courses at Westside High School?
>
> A – No.

(J.A. 231).

Permitting both curricular and noncurricular clubs accords with school officials' recognition that the "primary liberties in a student's life involve the process of inquiry and learning, of acquiring and imparting knowledge, and of exchanging ideas." (J.A. 489 [School Policy 5450]). In addition to clubs and activities, a school newspaper is published by the students (J.A. 136, 262-66, 326-27) and the administration invites speakers and organizations from the general public to participate in club activities and classes. (J.A. 95-96,

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[3] Indeed, the school has shown the movie "The Omen" concerning devil worship (J.A. 171). Abortion and homosexuality were also discussed *in class* at WHS. (J.A. 125). Yet, a voluntary, student-initiated Bible Club was not allowed to meet. Bible Club students could have discussed such controversial subjects from a Biblical perspective if permitted to meet on campus. (J.A. 75).

[4] As of August, 1984, the following Clubs and activities were recognized at WHS: Band, Chess Club, Cheerleaders, Choir, Class Officers, Computer Club, Distributive Education, Speech and Debate, Drill Squad and Squires, Future Business Leaders of America, Future Medical Assistants, Interact (associated with Rotary International), International Club, Latin Club, Math Club, Student Publications, Student Forum, Dramatics, Creative Writing Club, Photography Club, Orchestra, Outdoor Education, Swimming Timing Team, Student Advisory Board, Intramurals, Competitive Athletics, Zonta Club (associated with Zonta International girls association), Subsurfers, Welcome to Westside Club, Wrestling Auxiliary, National Honor Society and Peer Advocates. (J.A. 231, 479-487).

167-68, 175, 268-70, 279-81, 307-08, 360, 375-76, 451). Students are encouraged to "express opinions, to take stands, and to support causes, publicly or privately, in a manner consistent with the rights of others and the lawful functions and objectives of the school and school district." (J.A. 489). Yet, the students desiring to form a Bible Club were treated differently. (J.A. 72). They were banned not only from the club forum, but from meeting on a regular basis anywhere on the WHS campus. (J.A. 452).

Students attending WHS are told that they can organize and participate in a variety of student clubs and organizations which meet after school hours on school grounds. (J.A. 221-222, 297-298, 358, 479, 488). Superficially, clubs are allegedly "sponsored" by the assignment of "faculty sponsors." In most cases, these "sponsors" are monitors performing purely custodial functions. (J.A. 92, 111-12, 123-24). Several club "sponsors" did not regularly attend the club meetings. (J.A. 92). Kevin Dale Coates, a WHS student, testified that the "faculty sponsor" of the Computer Club was not a member of the teaching faculty of WHS and attended only "about a fourth" of the meetings. (J.A. 182). Likewise, Respondent Mergens testified that the "sponsor" of the Drama Club did not attend all of the meetings and "*sometimes* he would come back and lock up after we were done." (J.A. 92) (emphasis added). Student testimony was confirmed by Dr. Findley, the WHS Principal. Dr. Findley testified, with regard to the role of the faculty sponsor, "that there's not someone there all the time" monitoring the Club.[5] (J.A. 247). Some

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[5] The Equal Access Act, 20 U.S.C. § 4071(c)(2) (1984) prohibits the "sponsorship of the meeting by the school, the government, or its agents or employees." The term "sponsorship", however, as defined by the Act, prohibits participation, leading or promotion of the meeting by the school. "*The assignment of a teacher, administrator, or other school employee to meeting for custodial purposes does not constitute sponsorship.*" 42 U.S.C. § 4072(2) (emphasis added). In fact, the policy and practice of club sponsorship at WHS (J.A. 92, 111-12, 123-24, 182, 247) accords with the limited, "custodial," role permitted under the Equal Access Act. 20 U.S.C. § 4072(2).

sponsors receive remuneration for their services, while others do not. (J.A. 239).

School Board policy 5610 recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." (J.A. 488). Policy 5610 does not provide a procedure for the formation of clubs and organizations and there are no formal written guidelines for club creation. (J.A. 231, 240-41, 292-93, 359-60). At WHS, the practice is to direct student requests for club formation to Ronald Huston, the Activities Director, who analyzes proposals and determines compatibility with the missions and goals of WHS. (J.A. 231).

School Administrators testified that the Bible Club would be in accord with the goals and missions of WHS. (J.A. 234, 254). Yet, the students' request for a Bible Club was denied, and the denial was based solely on the content of the proposed club. (J.A. 71, 81, 341).

In January, 1985, Bridget Mergens requested permission from Dr. Findley, the school principal, to form a Bible Club that would meet at WHS after school hours. (J.A. 72). As stated previously, she requested that the club be treated in the same manner as other WHS clubs, but indicated that assignment of a faculty sponsor would not be required if the school could not or would not provide one. (J.A. 83-85). At the time of her request, Bridget Mergens was unaware of the requirements for forming a club but was "very willing to oblige whatever the school policy was." (J.A. 85). Immediately, Dr. Findley advised Bridget Mergens that she would not be permitted to meet due to the content of the proposed club. (J.A. 72, 81, 85-86, 246, 347-49, 373-74).

In February, 1985, Bridget Mergens again presented her request to Dr. Findley, together with Dr. James Tangdall, Associate Superintendent of Schools. This second request was discussed with School Superintendent Kenneth Hansen and all three officials agreed that the initial decision be upheld and that the Bible Club request would be denied based on the "separation of church and state" and administrative interpretation of school policy. (J.A. 341, 345-46). Administrators

agreed that students could discuss religious topics informally but that informal religious meetings conducted *by a group of students on a regular basis would be prohibited*. (J.A. 431-34, 451-54) (emphasis added). Bridget Mergens was given no opportunity to clarify her request or to discuss the purpose, goals and activities of the Bible Club with any school official. The denial was an immediate hysterical response to the idea of a "Bible Club."

On March 4, 1985, Bridget Mergens presented her request to the Westside Community Schools Board of Education. At the meeting, she stressed that students wanted to meet after school hours on a voluntary basis and that a faculty sponsor would not be necessary unless required by the school. (J.A. 59:15, 464-67). The school board voted to uphold the administrative decision denying permission to conduct a Bible Club at WHS (J.A. 467). No other student group has been denied access to WHS on the basis of the content of speech.[6] In this case, WHS students have been denied the right to meet at WHS for religious discussion after school hours. (J.A. 431-34, 451-54).

On April 17, 1985, five students and their parents brought suit against the school district, school administrators and school board members in the United States District Court for the District of Nebraska. The Complaint alleged that denial of the students' right to meet as a Bible Club violated their freedom of speech, freedom of assembly, free exercise of religion and equal protection rights guaranteed by the First and Fourteenth Amendments of the United States Constitution, and by Article I of the Nebraska Constitution and the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) (EAA). In their Answer, the Defendants denied the applicability of the EAA to WHS and relied on the Establishment Clause as their defense. (J.A. 37-54).

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[6] Student safety concerns resulted in a denial of access for a Dungeon and Dragons Club and certain athletic club requests were turned down for other reasons. (J.A. 293-94, 309-10, 352, 367).

On April 8, 1987, the case went to trial. On February 2, 1988, the district court entered judgment for the Defendants, holding that WHS maintains a closed forum and that, therefore, the EAA does not apply to WHS. Further, the court held that the actions of the Defendants did not violate the First and Fourteenth Amendment rights of the students. Effectively, the court dismissed Petitioners' contention that the Establishment Clause constituted a compelling interest justifying exclusion of a Bible Club from WHS by its finding that students at WHS could distinguish between school-mandated religious activity and student-initiated religious activity. The court based its finding in this regard on two factors:

> First, the proposed format protects against the conferring of an imprimatur of school approval. Second, Dr. David Workman, [sic] an expert in the development of cognitive reasoning and intellectual development, testified that students over the age of 12 years can make sponsorship distinctions and that there is no significant differences between high school and college students in their abilities to understand endorsement or nonendorsement by the school. The court credits this evidence.

Mergens v. Board of Education, No. CV 85-0-426 Slip Op. (1988) (reproduced in Pet. For Certiorari, Appendix B-11)

The court's finding on the issue of impressionability was based on the testimony of Dr. David Moshman and on the testimony of students who had no interest in forming or participating in a Bible Club. These students testified that they would feel no compulsion to attend a Bible Club if one were permitted access to WHS and that they would not view the existence of such a club as the school favoring one religion over another. (J.A. 211-12, 214-15).

In deciding that the Bible Club could not be permitted access to WHS, the district court held that the administrators' unwritten policy, requiring presentation of a balanced view when political, religious and economic information is dispensed within WHS facilities, constitutes a "legitimate educational concern which reasonably justifies WHS's actions in this case." *Mergens, supra*, at 15.

On February 8, 1989, the Eighth Circuit Court of Appeals reversed, holding that WHS maintains a limited open forum under the EAA, that the EAA is constitutional and that this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), requires reversal. The appeals court noted that the WHS administrators' interpretation of "curriculum-related" would permit school officials to circumvent the EAA by administrative fiat while allowing them to arbitrarily deny unfavored student speech. *Mergens v. Board of Education*, 867 F.2d 1076, 1079 (8th Cir. 1989). Relying on legislative history, the court found that, by allowing a Chess Club to meet, as well as many other noncurriculum-related clubs, WHS had created a limited open forum for student speech. *Mergens*, 867 F.2d at 1079.

The eighth circuit decision noted that the EAA closely tracks this Court's decision in *Widmar*. In fact, the court found that the only difference between this case and *Widmar* is the extension of *Widmar* principles to the high school level. In light of congressional fact-finding that rejected the notion that high school students would confuse an equal access policy with state sponsorship of religion, the court held that the EAA does not violate the Establishment Clause. *Mergens*, 867 F.2d at 1079-80. The Court concluded by stating that *Widmar* compels the same result even in the absence of the EAA.[7] *Mergens*, 867 F.2d at 1080.

Finally, the limited scope of this case is to be noted. This case does not involve an off-campus group seeking access to the WHS facilities. This case does not involve disruption or interference with the academic purpose or atmosphere of the high school. This case does not involve religious activity during the school day or during mandatory school hours. This case does not involve an effort by these students to obtain any greater accommodation for Bible Club meetings than is made for other student clubs at WHS. This case simply involves the

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[7] Indeed, this Court need not reach the constitutionality or applicability of the EAA and can affirm the eighth circuit decision by applying this Court's precedent in *Widmar, supra*.

right of these religiously motivated students to use school facilities after school hours with the same rights and responsibilities as other clubs and on an equal basis, without favoritism or opposition from the administration. In sum, this case is *Widmar v. Vincent* at the public secondary school level.

SUMMARY OF THE ARGUMENT

1. The High School Students Desiring to Form the Bible Club Were Protected By the First Amendment.

The First Amendment to the United States Constitution protects the students at WHS who desired to form a student-initiated Bible Club to meet after school in any empty classroom. These students did not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1964). There has been no showing or finding that the Bible Club would have "materially and substantially interfered with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. To the contrary, the testimony established that the Bible Club would meet the missions and goals of WHS. (J.A. 256).

In addition to the students' freedom of speech, the School Officials' ban of the Bible Club violated the students' freedom of association. *Healy v. James*, 408 U.S. 169, 180 (1972). The affected students wanted to meet for Bible study, prayer and worship, which are forms of speech protected by the First Amendment. *Widmar v. Vincent*, 454 U.S. 263 (1981). Equal treatment to that afforded the other student clubs and organizations was all these students desired. (J.A. 105, 109). Yet the School Officials would not even allow the students at WHS to meet informally on a regular basis. (J.A. 431-34, 451-54).

2. The Club System at Westside High School Constitutes an Open Public Forum.

The WHS Club System constitutes an open forum. This Court has identified three types of public forums: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Board of Airport*

Commissioners v. Jews for Jesus, 482 U.S. 569 (1987). Over thirty clubs and organizations exist at WHS. By policy and practice, School Officials at WHS have "created a forum generally open for use by student groups." *Widmar*, 454 U.S. at 267.

School Officials have not established any compelling state interest to justify their complete prohibition of the Bible Club. *Carey v. Brown*, 447 U.S. 455, 461 (1980); *Widmar*, 454 U.S. at 270. Their reliance on the Establishment Clause as a "compelling interest" was specifically rejected by this Court in *Widmar*. The School Officials' hostility toward the students' religious speech "show[s] a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Rather than utilizing narrowly drawn regulations employing the least restrictive means, School Officials have implemented a ban "that broadly stifle[s] fundamental liberties." *Shelton v. Tucker*, 364 U.S. 479 (1960).

3. The School Officials' Ban Is An Unconstitutional Prior Restraint.

The sweeping ban of the Bible Club is an unconstitutional prior restraint on the students' freedoms of speech and association. School Officials exercised the sort of official discretion that this Court will not tolerate. *Houston v. Hill*, 482 U.S. 451 (1987). Further, the School Officials' application of unwritten guidelines, coupled with their broad-based and open-ended view of "curriculum related," constitute vague policies in violation of the Due Process Clause of the Fourteenth Amendment. *New York v. Ferber*, 458 U.S. 747 (1985).

4. The Equal Access Act Is Constitutional.

The School Officials' ban of the student-initiated Bible Club is in violation of the Equal Access Act (EAA). The EAA became law in 1984. Under the EAA, public secondary schools that received federal financial assistance are required to grant equal access to their facilities for students wishing to meet for religious, political or philosophical purposes when the school has a limited public forum. 20 U.S.C. § 4071(a). Congress passed the EAA

to end confusion among school administrators by applying *Widmar* to public high schools, thereby insuring that public schools "not discriminate against speech based on its content." 130 Cong. Rec. S8332 (daily ed. June 27, 1984).

A public secondary school triggers the EAA "whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during non-instructional time." 20 U.S.C. § 4071(b). Over thirty student clubs and organizations meet and use WHS facilities after school hours. (J.A. 231, 479-87). The eighth circuit correctly noted that many noncurriculum-related clubs meet at WHS. *Mergens*, 867 F.2d at 1079. In fact, Dr. Findley, the WHS principal, admitted that the Peer Advocates Club is noncurriculum related. (J.A. 231). Furthermore, Interact, an affiliate of Rotary International which is imbued with moral philosophy, exists at WHS. Subsurfers Scuba Club, which is supervised by non-school personnel, is another noncurriculum club in existence at WHS. Dr. Sybouts, a curriculum expert, reviewed the EAA and its legislative history. Based on this review, Dr. Sybouts found that WHS had one or more noncurriculum-related clubs and therefore the EAA was triggered. (J.A. 412). 20 U.S.C. § 4071(b).

The EAA does not violate the Establishment Clause. The application of the three-part test enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), confirms the constitutionality of the EAA. The creation of a forum for student speech, including religious speech, constitutes a legitimate secular purpose. *Widmar, supra*. Likewise, a policy of equal access "does not confer any imprimatur of state approval on religious sects or practices." *Texas Monthly v. Bullock*, 489 U.S. ___, 109 S.Ct. 890 (1989). Over thirty student clubs and organizations are in existence at WHS. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274. By allowing a policy of equal access, School Officials will not be "making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. ___, 109 S.Ct. 3086 (1989).

The argument that high school students are more impressionable than college students was properly rejected by Congress, the District Court and the Eighth Circuit Court of Appeals. In short, a policy of equal access does not have the primary effect of advancing religion.

Finally, permitting a voluntary, student-initiated Bible club to meet during noninstructional time does not foster an excessive government entanglement with religion. In fact, enforcing a ban against religion at WHS would prove to be far more entangling than a neutral policy of equal access. *Widmar* at 272 n.11.

ARGUMENT

I. THE SCHOOL OFFICIALS' BAN OF A VOLUNTARY, STUDENT-INITIATED BIBLE CLUB IS AN UNCONSTITUTIONAL INFRINGEMENT ON THE STUDENTS' FREE SPEECH RIGHTS AS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS.

A. Public High School Students Have First Amendment Rights of Freedom of Speech and Freedom of Association.

The high school students at WHS who desired to form a voluntary student initiated Bible Club to meet on campus did not "shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).[8] As proposed to School Officials, the Bible Club meetings would have included Bible study, prayer and discussions of relevant topics in an effort to encourage personal and spiritual growth. (J.A. 73-77, 154-55, 185, 190). The Club would have met in "any empty classroom" either before the commencement of the required school day or after the completion of the school day. (J.A. 78, 117). The student-initiated

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[8] "This has been the unmistakable holding of this Court for almost 50 years." *Tinker*, 393 U.S. at 506; *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Bible Club simply desired the same rights, privileges, terms and conditions as the other clubs at WHS. (J.A. 75, 131, 163). *See* note 2, *supra*.

The School Officials' prohibition cannot be sustained since there has been "no finding and no showing that engaging in the [Bible Club] would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (*quoting Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). To the contrary, even the school administrators testified at trial that the Bible Club would be in accord with the goals and missions of the school. (J.A. 234, 254). Notwithstanding the obvious compatibility of the Bible Club's purpose and the school's goals, the students' request was flatly and unequivocally denied.

It was the *content* of the speech in *Tinker* to which the school board objected, and, likewise, it is the *content* of the students' speech in the present case, to which School Officials now object.[9] Yet,

> [i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may

[9] Professor Laurence Tribe noted that, for constitutional purposes, the speech in *Tinker* was indistinguishable from a student-initiated Bible study. "No conceivable principal of distinction can suggest that students who have a right to wear arm bands to protest the war suddenly lose that right if they utter the name of God in the process, or if, heaven forbid, they should do it as a group instead of single file." *Religious Speech Protection Act: Hearing on H.R. 4996 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2nd Sess. 47 (1984).

> not be confined to the expression of those sentiments that are officially approved.[10]

Tinker, 393 U.S. at 511.

Students who seek to form the Bible Club acknowledge that the School Officials have "important, delicate and highly discretionary functions" to perform. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). These functions, however, must be performed "within the limits of the Bill of Rights."[11] *Barnette, Id.* at 637. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). By forbidding the Bible Club to meet, the School Officials exercised "authoritative selection" violative of the well-established principle that the "classroom is peculiarly the marketplace of ideas." *Keyishian*, 385 U.S. at 603.

This Court has recognized that "personal intercommunication among the students" in high school is an activity to which schools are dedicated. *Tinker*, 393 U.S. at 512. The

[10] In fact, official approval is exactly what School Officials require. In his affidavit submitted at trial, James E. Findley, Principal of WHS, testified "[t]hat in the event any one or more of the student clubs or organizations are determined by the Court to be noncurriculum related and if the Court determines that Westside High School has a limited open forum under the Equal Access Act, *I would recommend to the administration and Board of Education that it consider amending the policies to discontinue such student clubs or organizations.*" (J.A. 472) (emphasis added).

[11] *See also, Board of Education v. Pico*, 457 U.S. 853 (1982). Public schools "are educating the young for citizenship [which] is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitutes." *Barnette*, 319 U.S. at 637.

WHS students desired to meet together before or after regular school hours. The right of these students to meet, does "not embrace merely the classroom hours." *Id.* The School Officials' prohibition against the Bible Club violates the students' rights of freedom of speech and freedom of association.[12]

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs." *Healy v. James*, 408 U.S. 169, 180 (1972). The School Officials have denied a fundamental constitutional right to the WHS students who seek to form a Bible Club. The students wanted treatment equal to that afforded other WHS clubs, nothing more. (J.A. 105, 109). Rather than provide equal treatment, School Officials, in an attempt to circumvent constitutional mandates, allegedly would have allowed the Bible Club to meet "informally" or off campus at a nearby church.[13] (J.A. 81, 83; Pet. Brief at 7). These identical contentions were raised by the school officials in *Healy* and rejected by this Court.

In *Healy*, school officials asserted that students desiring to form a local chapter of Students for a Democratic Society (SDS) could "meet as a group off campus . . . and that they still may meet together *informally* on campus – as individuals, but not as CCSC-SDS." 408 U.S. at 182 (emphasis added).

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[12] Those rights are protected by the First Amendment to the United States Constitution as applied to the States through the Fourteenth Amendment. "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the belief sought to be advanced by association pertain to political, economic, *religious* or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958) (citations omitted) (emphasis added).

[13] In fact, "informal" meetings held on campus on a regular basis would *not* have been allowed. (J.A. 431-434, 451-454).

Rejecting the school officials' proposition, this Court held that "the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities" imposed by the campus ban.[14] *Id.*

Similarly, the denial of official recognition burdens and abridges the freedom of association.[15] "The primary impediment to free association flowing from nonrecognition is the denial of use of campus facilities for meetings and other appropriate purposes." *Healy*, 408 U.S. at 181. The "associational interests" of students desiring to form the Bible Club "were circumscribed by the denial of the use of campus bulletin boards and the school newspaper." *Id.* These "impediments cannot be viewed as insubstantial." *Id.* at 182. The freedom of association is "protected not only against heavy handed frontal attack, but also from being shifted by a more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516 (1960).[16]

Recently this Court revisited issues of student free speech rights in the public high school environment. In *Hazelwood School District v. Kuhlmeir*, 484 U.S. ___, 108 S.Ct. 562 (1988), the Court reaffirmed the *Tinker* test for regulations of

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[14] This Court, in *Schneider v. State*, 308 U.S. 147, 163 (1939), held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

[15] There is a distinction between recognition and sponsorship. In Webster's Third New International Dictionary (1967), "recognition" is defined, in pertinent part, as "acceptance of an individual as being entitled to consideration or attention." *Id.* at 1896. "Sponsorship" is defined as "the state of being a sponsor; [the] act of sponsoring; *official or financial support.*" *Id.* at 2204 (emphasis added).

[16] As discussed *infra* at III B, Petitioners' justification for banning the Bible Club is based on concerns of an Establishment Clause violation. As discussed more fully below, a policy of equal access does not violate the Establishment Clause. Furthermore, it is the School Officials who have failed to meet the "heavy burden" necessary to demonstrate the appropriateness of their actions.

student-initiated speech.[17] While, in *Hazelwood*, this Court allowed school officials to edit and eliminate student-written stories from the high school newspaper, the Court unequivocally stated that the issues in *Hazelwood* were distinct from those presented in *Tinker*.

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that the students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.

Hazelwood, 484 U.S. at ___, 108 S.Ct. at 569.

The student-initiated, voluntary Bible Club at WHS would not be deemed "school sponsored" within the meaning of *Hazelwood*. In *Hazelwood*, the school paper

> Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

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[17] The *Tinker* test may be summarized as follows: Absent a showing that the speech activity would "materially and substantially interfere with the requirements of appropriate discipline" or would interfere with the rights of others, prohibition of the speech activity would be inappropriate. *Tinker*, 393 U.S. at 513. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), this Court again reaffirmed the principles enunciated in *Tinker*. In *Bethel*, the Court approved the school's actions in punishing a student for a nominating speech filled with lewd remarks and sexual innuendos. The speech was given at a *school assembly – a school-sponsored forum*. *Id.* at 677.

> The Board of Education allocated funds from its annual budget for the printing of Spectrum.

Id. at ___, 108 S.Ct. at 565.

Furthermore, "Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course." *Id.* at ___, 108 S.Ct. at 568.

These factors, indicating school sponsorship, are absent from the present case.[18] The Bible Club would have been voluntary, and it would have met after school. No credit or grade would have been received for participation. (J.A. 72, 78, 117). Furthermore, School Officials have no "legitimate, pedogogical concerns" with regard to the Bible Club. In fact, of the over 30 clubs and organizations at WHS, participation in only three of them could have any effect on a student's grade.[19]

The School Officials' sponsorship argument presents a "Catch 22" situation for the students. They argue that students can meet "informally" for religious discussions but that informal meetings conducted on a regular basis will not be allowed. (J.A. 431, 434, 451-454). The School Officials fault the students for requesting permission to meet on an equal basis with other student clubs; and they claim they did not request a faculty sponsor as required by Policy 5610. (J.A. 59, Pretrial Order Stipulation No. 13). School Officials further contend that the presence of a faculty sponsor at a Bible Club meeting would violate the Establishment Clause. Ultimately, the Bible Club is denied the right to meet either informally on a regular basis or formally at all. Thus, the School Officials' reasoning for the denial of access for students wishing to

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[18] Far from being taught by a faculty member, many "faculty sponsors" for WHS clubs frequently missed the meetings. (J.A. 92, 182, 247).

[19] Participation in Band, Choir and Drama can affect course grade. Each of these clubs, however, constitute activities that are part of the regular curriculum or activities that are extensions of secular academic classes. (J.A. 479, 483).

form a Bible Club, is merely a pretextual justification for discriminating against religious beliefs and speech.[20]

This Court has reaffirmed the duty of federal courts "to apply the First Amendment's mandates in our educational system" in order "to safeguard the fundamental values of freedom of speech and inquiry. . . ." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). "[B]asic constitutional values" are "directly and sharply" implicated in this case by the School Officials' ban of the student-initiated Bible Club. *Pico*, 457 U.S. at 866 (*quoting Epperson*, 393 U.S. at 104).[21] The student-initiated, voluntary Bible Club would not have "materially or substantially" disrupted the educational process, therefore, the School Officials' prohibition violates the students' free speech, free exercise and freedom of association rights protected by the First and Fourteenth Amendments. *Tinker*, 393 U.S. at 513.[22]

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[20] Christian fellowship, Bible reading, worship and prayer are a vital part of the daily lives of these students. (J.A. 75, 131, 163). In addition to the violation of the students' rights of freedom of speech and association, the School Officials' prohibition of the voluntary, student-led Bible Club violates the free exercise clause of the First Amendment. School Officials have denied a "benefit because of the conduct mandated by religious belief." *Thomas v. Review Board*, 450 U.S. 707, 717-18 (1981).

[21] *See also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983); Note, *Religious Expression on the Public School Forum: The High School Students' Right to Free Speech*, 72 Geo. L.J. 135 (1983).

[22] This Court can affirm the opinion of the United States Court of Appeals for the Eighth Circuit without reaching the constitutionality of the EAA or the applicability of the open forum doctrine. The constitutional rights of students to freedom of speech and freedom of association as set forth in *Tinker* and *Healy*, are independent of the EAA or the open forum doctrine.

1. Religious Discussion and Worship Are Forms of Speech Protected By the First Amendment.

As proposed to school officials, the Bible Club meetings would have included Bible study, prayer, and discussions of relevant topics in an effort to encourage personal and spiritual growth. (J.A. 73-77, 154-155, 185, 190). Identical speech was at issue in *Widmar*, 454 U.S. 263. A "typical Cornerstone meeting included prayer, hymns, Bible commentary and discussion of religious views and experiences." *Widmar*, 454 U.S. at 266 n.2. It is a constitutional axiom that the kinds of speech proposed for the student-initiated Bible Club, consisting of religious worship and discussion, "are forms of speech and association protected by the First Amendment." *Widmar*, 454 U.S. at 269.[23]

B. The Club System at Westside High School Is A Public Forum From Which A Voluntary, Student-Initiated Bible Club May Not Be Banned.

1. The Club and Organization System at Westside High School Constitutes An Open Public Forum.

The club and organization system in place at WHS constitutes an open public forum. "In balancing the government interest in limiting the use of its property against the interests of those who wish to use the property for expressive activity, the Court has identified three types of forum: the traditional public forum, the public forum created by government designation and the nonpublic forum." *Board of Airport Commissioners v. Jews for Jesus*, 482 U.S. 569 (1987).

An open forum consists of public property which the State has opened for use by the public, "or by some segment of the public, such as student organizations," as a place for expressive activity. *Hazelwood*, 484 U.S. at ___, 108 S.Ct. at

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[23] *See, e.g, Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *Niemetko v. Maryland*, 340 U.S. 268 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Schneider*, 308 U.S. 147; *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

568. The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. *Perry Education Assn. v. Perry Local Educational Assn.*, 460 U.S. 37, 45 (1983). Undeniably, WHS School Officials created a student activities forum. As in many other cases decided by this Court,[24] exclusions from a forum, "come[] to this Court bearing a heavy presumption against [their] constitutional validity." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 558 (1975). School Officials have failed to overcome that heavy presumption.

The *Widmar* decision controls the issues presented herein. The University of Missouri at Kansas City encouraged the activities of student organizations as its stated policy. Similarly, WHS School Officials "regard student clubs and organizations as a vital part of the education program." (J.A. 488). In *Widmar*, the University recognized over 100 student groups. Likewise, WHS School Officials recognized over 30 clubs and student organizations. Despite its stated policy, the University would not allow "Cornerstone" to meet on campus because a regulation prohibited the use of university grounds for religious teaching or worship. Likewise, WHS School Officials banned the student-initiated Bible Club because the content of the students' speech would have been "religious."

In *Widmar*, this Court held that the university's prohibition was unconstitutional. The facts of the present case dictate the same result reached in *Widmar*. "Through its policy of accommodating their meetings, [the School Officials have] created a forum generally open for use by student groups. Having done so, [the School Officials have] assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms." *Widmar*, 454 U.S. at 267. In *Widmar*, the University could not justify its exclusion of religious speech from the University forum. In the present

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[24] *See, e.g., Schneider, supra; Lovell, supra; Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

case, the School Officials have similarly failed to justify their policy of excluding religious speech.

2. The School Officials' Content-Based Ban Is Not Justified By a Compelling State Interest.

a. The School Officials' Ban is Content Based.

The School Officials' ban of the student-initiated Bible Club cannot be constitutionally justified.

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the [School Officials] must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest *and* that it is narrowly drawn to achieve that end.

Widmar, 454 U.S. at 269-70 (emphasis added); *Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980).[25]

There is no question that the Bible Club ban is a content-based response to the students' intended speech. (J.A. 81, 313). Dr. Findley testified at trial that it was the Christianity of the club that prompted his decision. (J.A. 312). This Court defines content-neutral speech restrictions as "those that are justified without reference to the content of the regulated speech." *Boos v. Barry*, 485 U.S. ___, ___, 108 S.Ct. 1157,

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[25] The least restrictive alternative test must be applied to this case because content-based bans "must be subjected to the most exacting scrutiny." *Ward v. Rock against Racism*, 491 U.S. ___, ___, 109 S.Ct. 2746, ___ (1989). The least restrictive alternative test must be applied here because of Respondents' asserted claims of injury to their rights of free exercise of religion. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) ("only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."). Petitioners content-based prohibition "is not narrowly tailored; a less restrictive alternative is readily available." *Boos*, 485 U.S. at ___, 108 S.Ct. at 1168.

1163 (1988) (citations omitted). Here, it was solely the *content* of the students' speech that was the basis for the implementation of the ban on the student-initiated Bible Club.[26]

b. The School Officials Have Not Shown a Compelling State Interest.

School Officials have failed to establish a compelling interest justifying the sweeping ban of the Bible Club. Their reliance upon the Establishment Clause as a "compelling interest" was specifically rejected by the *Widmar* Court.[27] While this Court agreed "that the interest of the University in complying with its constitutional obligations may be characterized as compelling[,] *[i]t does not follow, however, that an "equal access" policy would be incompatible with this*

[26] Stressing its disdain for content-based prohibitions, this Court has said:

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. [Citations omitted.] . . . The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ." [*New York Times Co. v. Sullivan*, 376 U.S. at 270].

Police Department v. Mosley, 408 U.S. 92, 95-96 (1972).

Content-based regulation of speech constitutes "censorship in a most odious form" and violates the First Amendment. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). Education is a proper and preferable alternative to censorship. *Whitney v. California*, 274 U.S. 357 (1927). Content-based discrimination also constitutes a violation of Equal Protection through the Fifth Amendment. *Wayte v. United States*, 470 U.S. 586, 608 n.9 (1985).

[27] For an analysis of the Establishment Clause under the three-prong test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), see section III B, *infra*.

Court's Establishment Clause Cases."[28] *Widmar*, 454 U.S. at 271 (emphasis added).

Voluntary, student-initiated, student-led religious activity on public school property has never been prohibited by this Court. Indeed, this Court's interpretation of the Establishment Clause has required that school officials accommodate the needs of students with religious convictions. *See, e.g., Yoder*, 406 U.S. 205.

Sound constitutional distinctions may be made between a State-initiated religious activity, in which students choose whether or not to participate and a voluntary, student-initiated religious activity that school officials simply permit under a neutral policy of equal access allowing students to meet to discuss their various interests. Markedly different from a voluntary, student-initiated Bible Club are state statutes *requiring* posting of the Ten Commandments in public classroom walls, *Stone v. Graham*, 449 U.S. 39 (1980), state laws *requiring* daily Bible reading and recitation of the Lord's Prayer in public classrooms, *School District v. Schempp*, 374 U.S. 203 (1963), state statutes *requiring* recitation of a State-composed prayer in the public classroom, *Engel v. Vitale*, 370 U.S. 421 (1962), and state statutes *requiring* teachers that teach evolution to also teach creation, *Edwards v. Aguillard*, 482 U.S. 578 (1987).

[28] The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion. . . ." U.S. Const., amend. I. The Establishment Clause is applicable to the States through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Petitioners have also asserted that they have met the compelling state interest test because the Bible Club would not have presented a "balanced view" (Pet. Brief at 44). Rather than justifying their ban in light of this Court's precedent, Petitioners rely upon a heretofore unheard of theory of law requiring the presentation of a "balanced view" when controversial subjects are discussed at WHS. Presenting a balanced view does not constitute a compelling interest. This Court examines, with the highest degree of scrutiny, regulations that infringe on constitutional rights. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982).

The Establishment Clause was designed to prevent government from exercising jurisdiction over matters of religion. The Establishment Clause does not address or affect rights of communication between individuals. As Justice Brennan wrote in his concurring opinion in *McDaniel v. Paty*, 435 U.S. 618, 641 (1978), "the Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Yet, the School Officials have treated the students desiring to form the Bible Club at WHS as "subversives." Dr. Findley, the Principal at WHS, testified that if the Court deems WHS a public forum, he would "recommend to the administration and the Board of Education that it consider amending the policies to discontinue such student clubs or organizations." (J.A. 472).

The School Officials' hostility toward the students' religious speech "show[s] a callous indifference to religious groups." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).[29] This Court has recognized that the "Establishment Clause mandates state neutrality, not *hostility*, toward religion."[30] *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 554 (1986). (Burger, C.J. dissenting) (emphasis added).

The Free Speech Clause and the Establishment Clause do not conflict.

> [T]he First Amendment require[s] vision capable of distinguishing between *state* establishment of religion, which is prohibited by the Establishment Clause, and *individual* participation and advocacy of religion which, far from being prohibited by the Establishment Clause, is affirmatively protected by

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[29] In fact, Respondent Andrea Dawn Simmonds testified that when school officials denied the Bible Club the right to meet, she felt that she was discriminated against on the basis of her religious beliefs. (Tr. 100).

[30] In *Everson v. Board of Education*, 330 U.S. 1, 18 (1947), Justice Black, writing for the Court, stated that the First Amendment "requires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used to handicap religions than to favor them."

> the Free Exercise and Free Speech Clauses of the First Amendment.

Bender, 475 U.S. at 553.

Equal access to public high schools for all lawful groups who are entitled to be there is precisely the ideal and vision of the Founding Fathers. To exclude a student-initiated, student-led Bible Club from the WHS club forum offends the very core of the First Amendment. *Widmar, supra; Niemetko, supra*. A policy of equal access at WHS would not *endorse* religion, nor *promote* it, nor would it *coerce* participation. Over 30 clubs and organizations are in existence at WHS. By following a policy of equal access, School Officials will not be "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. ___, 109 S.Ct. 3086 (1989). In sum, an equal access policy does not constitute a violation of the Establishment Clause of the First Amendment. *See generally*, Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986).

3. The School Officials' Ban Is Not Narrowly Tailored.

The absolute ban of a student-initiated Bible Club from the WHS campus is not "narrowly drawn" nor does it utilize "least restrictive alternatives" as is required to meet constitutional standards. *Widmar, supra; Carey, supra; Boos, supra; Ward, supra; Shelton, supra*. "[B]ecause First Amendment freedoms need 'breathing space' to survive, government may regulate in this area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). "Precision of regulation must be the touchstone" in regulating free speech. *Id.* at 438.

Rather than implementing narrowly drawn regulations, School Officials implemented a ban "that broadly stifle[s] fundamental personal liberties when the end can be more narrowly achieved." *Shelton*, 364 U.S. at 252. Many less restrictive alternatives exist which would accommodate the School Officials' concern. The students would have been

willing to allow School Officials to post disclaimers in order to convey state neutrality to the student population. (J.A. 72).[31] Yet School Officials did not even consider these least restrictive means. (J.A. 73). These same School Officials must teach the meaning of the Bill of Rights to students, not only by *words*, but by *action*. *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979). Instead of complying with the applicable constitutional requirements, however, School Officials created a "First Amendment Free Zone" at WHS with regard to the Bible Club. *Jews for Jesus*, 482 U.S. at 574.

C. The School Officials' Ban of a Student-Initiated Bible Club is Unconstitutional Because It Is An Effort To Suppress Expression Merely Because They Oppose the Students' Viewpoints.

The School Officials' ban of a student-initiated Bible club would be unconstitutional even in a nonpublic forum because it is an, "effort to suppress expression merely because public officials oppose the speaker's view." *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 46 (1983). Just as a ban may be void regardless of the nature of the forum on overbreadth grounds, *Bd. of Airport Com'rs of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), so too, the School Officials' ban is void regardless of the nature of the forum because it is, "impermissibly motivated by a desire to suppress a particular point of view." *Cornelius v. N.A.A.C.P. Legal Defense & Ed. Fund*, 473 U.S. 788, 812-13 (1985).

Although the School Officials may prefer the discussion of "some subjects over others," they have intentionally, albeit impermissibly, engaged in blatant viewpoint discrimination. Principal Findley so desires to suppress the students' world view that he would rather, "discontinue such student clubs or

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[31] In fact, at trial, Bridget Mergens testified that if the School Officials wanted to make a disclaimer announcement in the school paper or through the P.A. system, "that would have been fine with me, sir." (J.A. 73)

organizations," than permit the students to study the teachings of the Bible in a student-initiated Bible Club. (J.A. 472).

In contrast, the teachings of the viewpoint of Interact, a student affiliate of the Rotary Club International, receives official sponsorship under the school's own view of "sponsorship." Instead of a Ten Commandments, Interact employs the 4-Way Test. The 4-Way Test is:

1. Is it the TRUTH?
2. Is it FAIR to all concerned?
3. Will it build GOODWILL and BETTER FRIENDSHIPS?
4. Will it be BENEFICIAL to all concerned?

Rotary International, The 4-Way Test Of The Things We Think, Say Or Do (Rotary International, Evanston, Illinois).

This admirable guiding ethic is considered by Rotarians to be the catalyst for "a great improvement in moral character" for its adherents. *Id.* at 9.

Justice Stevens has previously addressed the impermissibility of inconsistent approaches to doctrinally-related school clubs:

> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted. The fact that their expression of faith includes ceremonial conduct is not, in my opinion, a sufficient reason for suppressing their discussion entirely.

Widmar v. Vincent, 454 U.S. 263, 281 (1981) (Stevens, J., concurring).

Assuming, *arguendo*, the validity and reasonableness of the school's justifications for banning the club, "those justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view." *Cornelius*, 473 U.S. at 812. Under the school's view, the Establishment

Clause prohibits a Bible club because the school sponsors clubs, yet they simultaneously sponsor the viewpoint of Rotary International through the Interact Club. The school's ban therefore is void, regardless of the nature of the forum, because School Officials admit that they have acted, "with the intent of promoting a particular point of view in religious matters," *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

D. The School Officials' Ban of the Bible Club Is Not A Reasonable Time, Place and Manner Regulation.

Reasonable time, place and manner restrictions, not sweeping prohibitions, are the means by which School Officials may control access to a public forum. Such restrictions must be content neutral and "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45. Insofar as the School Officials' policy bans the Bible Club from WHS, it offends the First Amendment for it is neither a reasonable time, place and manner restriction nor is it narrowly drawn to serve a significant government interest.[32] The prohibition of the Bible Club at WHS is the type of "sweeping ban" that this Court has consistently condemned.[33]

As an attempt to "save" the constitutionality of the prohibition, School Officials asserted that the Bible Club could

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[32] As set forth fully *supra*, the School Officials' ban of the Bible Club is not content neutral. (J.A. 255).

[33] *United States v. Grace*, 461 U.S. 171 (1983) (a total ban on display of "flags, banners, or devices" on the sidewalk surrounding the Supreme Court is unconstitutional); *Schaumburg v. Citizens For a Better Environment*, 444 U.S. 620, 637 (1980) ("measures less intrusive than a *direct prohibition* on solicitation" can be instituted to prevent fraudulent misrepresentation); *Frisby v. Schultz*, 487 U.S. ___, 108 S.Ct. 2495 (1988) (picketing in front of a single residence may be prohibited, *but not* general marching through a residential neighborhood). *See also Heffron, supra*, (free speech activities allowed; solicitation on fairgrounds,

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meet in a church across the street from the school. This self-serving gesture cannot be countenanced. Relegating students otherwise entitled to participate in the club system forum has the effect of "stamping" Bible Club participants with "a badge of inferiority." *Plessy v. Ferguson*, 163 U.S. 537 (1896). The time is long past when School Officials may satisfy the Equal Protection Clause by providing separate but equal facilities. *Brown v. Board of Education*, 347 U.S. 483 (1954). Finally, as this Court recognized over fifty years ago, "[o]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider*, 308 U.S. at 163.

II. THE BAN OF A STUDENT-INITIATED BIBLE CLUB CONSTITUTES A VIOLATION OF THE STUDENTS' DUE PROCESS RIGHT BECAUSE OF THE LACK OF OBJECTIVE STANDARDS AND PROCEDURAL SAFEGUARDS WHICH RESULTED IN THE SCHOOL OFFICIALS' EXERCISE OF ARBITRARY DISCRETION.

A. The School Officials Exercised Impermissible Discretion.

The School Officials' ban of the student-initiated Bible Club is an unconstitutional prior restraint on the students' freedoms of speech and association. Many times this Court has held that arbitrary official discretion to permit or forbid First Amendment activities constitutes an impermissible prior restraint. *Niemotko*, 340 U.S. at 271. Even a cursory review of the facts of this case establishes that the WHS School

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however, required to be conducted from booths to ensure orderly movement of crowds). By enacting reasonable time, place and manner restrictions rather than flat prohibitions, free speech will not be stifled at its source. *Kovacs v. Cooper*, 336 U.S. 7 (1949) (prohibiting *only* those "sound trucks that emit loud and raucous noise"); *Grayned*, 408 U.S. 104 (prohibiting only those demonstrations that disrupt normal activities).

Officials exercised the type of unbridled discretion "to grant or withhold [permission] upon a broad criteria unrelated to the proper regulation of public places" that this Court has consistently condemned. *Id.* at 294; *accord, Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984).

Westside School District, like the University in *Widmar*, has applied a policy favorably toward non-religious student groups while applying the same policy in an invidiously discriminatory manner against religious student groups. Dr. Findley, the WHS Principal, testified that he and Mr. Huston are responsible for evaluating student requests for the creation of student organizations. (J.A. 241). He testified that there was *no written procedure* for assessment of student requests (J.A. 241), only the unwritten, customary procedure that has evolved over the years. (J.A. 241). The *unwritten policy* requires Dr. Findley and Mr. Huston to assess each student request by determining the goals and objectives of the club (J.A. 358, 359), and by meeting with potential sponsors to "see whether or not it fits under our guidelines and our Board Policy." (J.A. 359). Only after such an investigation would the administrators make the decision whether to approve or deny the club. (J.A. 241).

Bridget Mergens' request for a Bible Club was treated differently. When she made her first request to Dr. Findley, it was immediately denied. (J.A. 72). Mr. Huston was told about the request only after it had already been denied by Dr. Findley. Mr. Huston testified that Dr. Findley told him that someone had requested the formation of a Bible Club. (Tr. 512:17-22). Mr. Huston stated he had no input at all into the decision-making process for denial of the club. (J.A. 361). Furthermore, Dr. Findley had already told Mr. Huston that it was his opinion that the Bible Club could not meet. (J.A. 254).

Dr. Findley did not review school policy before the denial (J.A. 256, 257), nor did he seek a legal opinion before denial, despite the fact that the students requested that their club meet under the guidelines of the EAA. (J.A. 87). The denial was based on Dr. Findley's own interpretation of the Act (J.A. 244, 246), and "the fact that it appeared to me that it

was advocating a religious viewpoint instead of giving a study of a religion. . . ." (J.A. 246). Dr. Findley denied access to the proposed club, because he felt that it violated the missions and goals of WHS in that the Club would not "give both sides." (J.A. 254). He then admitted that he had made an "*assumption*" with regard to the students' request (J.A. 255), and finally stated that a Bible Club could meet the missions and goals requirements of WHS. (J.A. 256).

The student Bible Club at WHS was denied access under an *oral* policy which was applied in an invidiously discriminatory and unequal manner. The administration failed to abide by its own policy and exercised unfettered discretion in violation of the First Amendment and Equal Protection Clause.[34]

The School Officials' standardless policy provides the "opportunity for abuse, especially where a [policy] has received a virtual open-ended interpretation" in violation of this Court's many precedents. *Lewis v. City of New Orleans*, 430 U.S. 130, 135-36 (1974) (Powell, J., concurring). *See also Houston v. Hill*, 482 U.S. 451 (1987); *Kolender v. Lawson*, 461 U.S. 352 (1983). School Officials must not be allowed to continue to hold and exercise the sort of official discretion that this Court refuses to tolerate.

B. The School Officials' Ban of the Student-Initiated Bible Club Is Vague.

The School Officials' "unwritten guidelines", coupled with their broad-based and open ended view of "curriculum related," constitute vague policies in violation of the Due Process Clause of the Fourteenth Amendment. These "policies" embody both offensive aspects under the vagueness doctrine:

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[34] This proscription violates the Equal Protection Clause of the Fourteenth Amendment. It singles out religious clubs as a suspect class and deprives that class of benefits accorded to all other WHS student clubs and organizations. *See Police Department v. Mosley*, 408 U.S. 92, 102 (1972).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). . . . This Court has recognized that "a sweeping statute or one incapable of limitation has the potential to repeatedly chill the exercise of expressive activity by many individuals . . . ."

New York v. Ferber, 458 U.S. 747, 772 (1985).

At trial, Dr. Findley admitted that he made an "assumption" with regard to the proposed Bible Club. He employed "unwritten policy", and there was no "written procedure" for assessment of students' requests, according to his trial testimony. Finally, all the recognized clubs were, in Dr. Findley's opinion, "curriculum related." This vagueness produces a chilling effect in violation of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 76-82 (1979); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12 (1974). The Eighth Circuit Court of Appeals condemned the application of "curriculum related" as proposed by the School Officials:

> Allowing such a broad interpretation of "curriculum related" would make the Equal Access Act meaningless. A school's administration could simply declare that it maintains a closed forum and then choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time, the administration could arbitrarily deny access to

> school facilities to any unfavored student club *on the basis of its speech content. . . . .A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.*

Mergens, 867 F.2d at 1078 (emphasis added).

The line between the School Officials' opinion of curriculum-related clubs "is, at best, murky," and therefore the application of the policies are void for vagueness. *Jews for Jesus, supra.*

III. THE EQUAL ACCESS ACT IS CONSTITUTIONAL UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

The School Official's Ban of the WHS student initiated Bible Club was a violation of the Equal Access Act. The Equal Access Act requires a public secondary school receiving federal financial assistance to grant equal access to its facilities for students wishing to meet for *religious, political* or *philosophical* purposes when the school has a limited public forum.[35] 20 U.S.C. § 4071(a) (1984). According to the sponsors of the Act, it was necessary for Congress to end confusion among school administrators by applying the

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[35] The EAA was passed by overwhelmingly bipartisan majorities in the House of Representatives (377-73) (130 Cong. Rec. H7740-41 (daily ed. July 25, 1984)), and the Senate (88-11) (130 Cong. Rec. S8370 (daily ed. June 27, 1984)). Its supporters cited the need to end discrimination and hostility toward students desiring to voluntarily associate themselves together in common interest for religious discussion. *See* 130 Cong. Rec. S8337 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *see also id.* at S8331-332 (statement of Sen. Hatch); *id.* at S8355 (statement of Sen. Levin); *id.*, at S8365 (statement of Sen. Baucus); 130 Cong. Rec. H7730 (daily ed. July 25, 1984) (statement of Rep. Nielson); *id.* at H7734 (statement of Rep. McEwen). "Equal Access will go a long way toward ending the official hostility that has come to dominate the Government's attitude toward the free and voluntary practice of religious beliefs." *Id.* at H7737 (statement of Rep. Emerson).

principles enunciated in *Widmar*, to insure that "[g]overnment may not discriminate against speech based on its content." 130 Cong. Rec. S8332 (daily ed., June 27, 1984) (statement of Sen. Hatch); *id.* at S8358 (remarks of Sen. Durenburger).[36] The function of this Court in interpreting the EAA "is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Association*, 310 U.S. 534, 542 (1940). Simply stated, the EAA was enacted in part to eradicate invidious discrimination against student-initiated religious speech such as was perpetrated by the WHS School Officials.[37]

A. Westside High School Has Established a Limited Open Forum Under the Equal Access Act.

School Officials have created a limited open forum at WHS. In determining whether School Officials created a "limited open forum" under the EAA, the *policy* and *practice*

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[36] Sen. Denton stated that the EAA is designed to clarify that secondary school students "have the same rights to associate together and to speak, as do students who wish to meet to discuss chess, politics or philosophy." 130 Cong. Rec. S8335 (daily ed. June 27, 1984).

[37] Sen. Mark Hatfield, the primary sponsor of the EAA, in expressing his adamant opposition to the President's School Prayer Amendment stated:

> Instead of concentrating our attention on initiatives like a School Prayer Amendment, I would urge my colleagues to devote their energies to rooting out ridiculous barriers that have been enacted to forbid voluntary meetings of students who seek to meet and pray in non-disruptive ways.

128 Cong. Rec. S11781 (daily ed. Sept. 17, 1982) (printed remarks of Sen. Hatfield).

In fact, the majority of those who strongly opposed the prayer amendment expressed complete support for the Equal Access Act, and concern that, "[s]chools today are being hostile toward religion. Not neutral, but plainly antagonistic." 130 Cong. Rec. S8360 (daily ed. June 27, 1984) (statement of Sen. Mattingly); *see also id.* at S8340 (remarks of Sen. Leahy); *id.* at S8356 (remarks of Sen. Bumpus); *id.* at S8358 (remarks of Sen. Biden).

at the school is determinative. A public secondary school triggers the EAA "whenever such school grants an offering to or opportunity for one or more noncurriculum-related student groups to meet on school premises during non-instructional time." 20 U.S.C. § 4071(b). Approximately 30 student clubs and organizations meet and use the facilities of WHS after regular school hours. (J.A. 231, 479-87). Attendance at these clubs is voluntary, and they exist and function on the basis of student interest. (J.A. 276-277, 363-364). School Officials testified that clubs cease to exist when student interest wanes. (J.A. 276-77, 363-364). Participation in extracurricular activities is encouraged, and the administration entertains student suggestions for the formation of clubs. (J.A. 230-231, 240-241, 290-291, 358). Teachers play the role of custodial monitors and do not "instruct" in any sense, in the majority of these groups meetings.[38] (J.A. 92, 111-12, 123-24).

As the Eighth Circuit Court of Appeals held, many non-curriculum-related clubs meet at WHS. *Mergens*, 867 F.2d at

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[38] The Computer Club sponsor is not a member of the teaching faculty and was not present for "about a fourth" of the club meetings. (J.A. 182).

Bridget Mergens testified that the Drama Club was directed and run by the student officers and that the sponsor would "sometimes . . . come back and lock up after we were done." (J.A. 92). When asked about the proposed Bible Club, Bridget Mergens testified:

> Q. Who did you expect to direct the activities of the club?
>
> A. Students, simply like any other club that I was ever involved in that was not Choir. Other than Choir, all the arrangements were made by the students. It would simply be the same format as that.

(J.A. 112); *see also* J.A. 124 (Spanish Club directed by students).

The EAA provides for teacher sponsorship to the extent that they are present in a nonparticipatory capacity. 20 U.S.C. § 4071(c)(3) (1984). That section of the Act explains § 4071(c)(2) which would otherwise appear to permit schools to avoid equal access by requiring "sponsorship" of student meetings. The term "sponsorship" is defined by the Act in § 4072(2) and specifically provides that the assignment of a teacher "for custodial purposes does not constitute sponsorship of the meeting."

1078. During Senate debates, Sen. Hatfield stated that "curriculum related" meant the club or organization was an "extension of the classroom". 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).[39]

In order to determine the extent of the forum at WHS under the EAA, this Court must answer one fundamental question: *Are the recognized clubs and activities directly related to curriculum course work*? If not, the clubs are not

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[39] In Webster's Third New International Dictionary Unabridged, 1986, the word "curricular" is defined as, "of or relating to academic courses of study." The word "curriculum" is defined as:

> The whole body of courses offered by an educational institution or one of its branches. Any particular body of courses set for various majors (e.g., the curriculum in engineering)

Id. at 557.

The word "courses" is defined in that same volume as:

> An educational unit usually at the high school, college, or university level consisting of a series of instruction periods (as lectures, recitations, and laboratory sessions) dealing with a particular subject.
>
> A series of such courses coordinated to constitute a curriculum and leading typically to a degree.

Id. at 522.

In contrast, the word "extracurricular" (also "extracurriculum") is defined as:

> Outside a regular curriculum: not falling within the scope of a regular curriculum; specifically: of or relating to *officially or semiofficially* approved, and organized *student activities* (athletics, dramatics, or publication of a school newspaper) connected with the students' school and *usually carrying no academic credit.*

Id. at 806 (emphasis added).

The common and most recognized usage of the word reflects *direct application to academic courses* of study offered at a high school or university which are required in order to obtain a degree. With the exception of Drama Club, Band and Choir, the clubs at WHS are not academically oriented and are not required for high school graduation. (J.A. 479, 483).

"curriculum related" and the school has established a limited open forum under the EAA.[40]

Despite WHS School Officials attempt to broadly interpret "curriculum related" and rationalize the exclusion of the Bible Club, Dr. Findley conceded that Peer Advocates is noncurriculum related.

> Q. Did Peer Advocates, when you were looking at it, relate to any of the required curriculum or elective curriculum courses at Westside High School?
>
> A. No.

(J.A. 231).

Furthermore, Interact is a moral philosophic service club at WHS related to Rotary International. Interact operates in conformity with specified philosophical guiding principles of Rotary International. (J.A. 287-89). Rotarians attend Interact meetings and on occasion Interact members attend Rotary functions. (J.A. 299-300, 367-68). Interact, like all other WHS clubs is voluntary and is not required for class credit or graduation and is not directly related to curriculum course

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[40] Under Representative Goodling's test, a club is curriculum related only if the students who are in the club also attend the related class. 130 Cong. Rec. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

Sen. Dole stated that a club or activity is noncurricular if the meetings are "not directly related to the school's curriculum". 130 Cong. Rec. S8362 (daily ed. June 27, 1984).

Sen. Hatfield also posited that if the school permits students to initiate requests for the formation of clubs, they have established a limited open forum. 130 Cong. Rec. S8342 (daily ed. June 27, 1984).

Other legislators expressed the same principle in a slightly different manner: If a school permits "voluntary student groups," "student activities," or "student groups" to meet, it must permit voluntary student groups to engage in religious speech. 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (statement of Sen. Gorton).

work. (J.A. 226-28). Interact is a noncurriculum-related activity within the parameters of the EAA.[41]

The existence of a Chess Club at WHS triggers the EAA, as evidenced by the following debate:

> Mr. Gorton: I gather from the previous remarks of the Senator from Oregon and the Senator from Alabama that the definition of these non-related student groups is fairly broad. The Chess Club would be such a group. If the school permits a Chess Club, it has thereby created the limited open forum which brings into effect the proscriptions of the act.
>
> Mr. Hatfield: That is correct.

130 Cong. Rec. S8342 (daily ed. June 27, 1984) (colloquy of Sen. Hatfield and Sen. Gorton).

WHS has compiled a list of activities and has specifically defined such clubs as Band, Choir and Distributive Education as being "included in our regular curriculum", "offered as a part of the curriculum" and "this is an organization that is an extension of the Distributive Education class." (J.A. 479-87). Similar references are made to the Dramatics Club and Orchestra Club. (J.A. 479-87). The Chess Club is defined, however, as an activity "for those interested in chess"; Interact and Zonta are described by reference to nationally recognized service organizations. (J.A. 479, 481, 485). By virtue of these descriptions, WHS has identified those clubs which are either curriculum or noncurriculum related within its club system.

At trial, Dr. Ward Sybouts, a curriculum expert, testified that he had studied the EAA, EAA guidelines, legislative history and the WHS club system. He testified that, in his

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[41] "For many decades Rotary clubs and Rotarians around the world have used The 4-Way Test as an instrument to develop respect and understanding among peoples." Rotary International, The 4-Way Test Of The Things We Think, Say Or Do (Rotary International, Evanston, Illinois).

opinion, Congress had adopted a definition of curriculum that included only those student activities related to courses offered at the school. (J.A. 408). When asked to give his opinion about specific WHS clubs, Dr. Sybouts stated that Interact "would be non-curriculum[,]" (J.A. 410), and that Chess Club "would be more likely considered as a non-curriculum-related club." (J.A. 410). Similarly, Welcome to Westside "would be a service activity and probably not related to a course and therefore it would be non-curricular." (J.A. 411). Also, Dr. Sybouts testified that since WHS had no class in leadership, "student council or your student forum is non-curricular." (J.A. 412). In summary, after reviewing the Student Activities List (J.A. 479), Dr. Sybouts testified WHS had one or more non-curriculum-related clubs. (J.A. 412).

The evidence in this case fully supports the eighth circuit's finding that WHS has created a limited open forum under the EAA. The court of appeals correctly held that adopting the School Officials' view of the forum would permit them to "arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content." *Mergens*, 867 F.2d at 1078.

The School Official's interpretation of "curriculum related," as anything that remotely relates to the educational purpose and mission of WHS, violates the Act itself, as well as congressional intent. It is conceivable that any student group under such a definition would qualify as "educational," including the students proposed Bible Club.

As the Eighth Circuit correctly observed, "[a]llowing such a broad interpretation of 'curriculum-related' would make the EAA meaningless." *Mergens*, 867 F.2d at 1078. To define "noncurriculum related student group" in a way that allows schools to evade the Act by cleverly describing existing student groups is not faithful to Congress' intent to protect "extracurricular student speech." *See e.g.*, 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (colloquy of Sen. Hatfield and Sen. Gorton).

B. The Equal Access Act Does Not Violate the Establishment Clause of the First Amendment.

The Equal Access Act does not conflict with the Establishment Clause. In this case, the conflict is between the WHS students and the School Officials' incorrect view of the law. Wrongly, the School Officials assert, that equal treatment of voluntary, student-initiated religious speech in a high school setting operates to establish religion in violation of the First Amendment. A careful analysis of this Court's relevant precedents, however, establishes that a policy of equal access for student organizations does not violate the Establishment Clause. *Widmar, supra.*

In *Widmar,* this Court provided a framework for analyzing equal access issues consistent with this Court's earlier decision in *Lemon,* 403 U.S. at 612-13, noting that

> a[n equal access] policy will not offend the Establishment Clause if it can pass a three-pronged test: "First, the [governmental policy] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [policy] must not foster 'an excessive government entanglement with religion.' "

Widmar, 454 U.S. at 263 (*quoting Lemon,* 403 U.S. at 612-13).[42]

In *Widmar,* this Court held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion. *Widmar,* 454 U.S. at 271-72. With respect to the claim that allowing religious groups to share the forum would

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[42] The analysis of the three-part *Lemon* test is equally applicable to both a "policy and practice" of equal access and the Equal Access Act. This Court, however, has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *See Lynch,* 465 U.S. at 679; *Tilton v. Richardson,* 403 U.S. 672 (1971).

have the primary effect of advancing religion, this Court stated that the real question was whether the university, having opened its facilities for use by student groups, could "now exclude groups because of the content of their speech." *Id.* at 273. This Court concluded that the school could not do so without violating the students' First Amendment rights.

1. The Equal Access Act Has a Secular Legislative Purpose.

The plain language of the EAA proclaims a secular legislative purpose. The Act's purpose, as stated by its sponsors, was to end discrimination and confusion surrounding free speech and assembly rights of students. *Supra* fns. 35-37. Facially, the Act not only prohibits discrimination against religious meetings, but protects "political, philosophical or other content of the speech at such meetings" as well. Title 20 U.S.C. § 4071(a); 130 Cong. Rec. H7734 (daily ed. July 25, 1984) (statement of Rep. Smith of Nebraska).[43]

As this Court noted in *Widmar,* the creation of a forum for student speech, including religious speech, constitutes a legitimate secular purpose. That a policy of equal access touches on religious speech is no more violative of the *Lemon* test than is the inclusion of religious groups in any other public forum created for secular reasons. As Justice Scalia stated in *Aguillard,* in "all three cases in which we have struck down laws under the Establishment Clause for lack of a secular purpose, we found that the legislature's *sole* motive was to promote religion." *Aguillard,* 482 U.S. at 614 (Scalia,

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[43] This Court noted in *Aguillard,* 482 U.S. 578, that it "is normally deferential to a [governmental] articulation of a secular purpose . . . ." *Id.* at 586. In *Lynch,* 465 U.S. 668 (1984), this Court held that a *non-secular purpose* will not be inferred lightly.

J., dissenting) (emphasis added).[44] Both the EAA and an equal access policy meet the secular purpose prong of *Lemon*.

2. Equal Access Does Not Have the Primary Effect of Advancing Religion.

Allowing a voluntary, student-initiated Bible Club to meet at WHS does not have the primary effect of advancing religion. This Court rejected the claim that the extension of an open forum policy to student religious groups would have the impermissible primary effect of advancing religion. *Widmar*, 454 U.S. at 273-75. Acknowledging that it was "foreseeable" that religious groups would benefit from the open forum policy, this Court nevertheless held that any benefit would be "merely incidental" and therefore, would not constitute the advancement of religion under the Establishment Clause.[45]

Two factors were identified by the *Widmar* Court as especially relevant to its holding: first, the fact that an open forum policy "does not confer any imprimatur of State approval on religious sects or practices," and second, the fact that the forum was available to a broad class of speakers. *Widmar*, 454 U.S. at 274; *see also Texas Monthly v. Bullock*, 489 U.S. ___, 109 S.Ct. 890 (1989).

The endorsement inquiry "turns upon the context in which the contested object appears." Thus, "[e]very government practice must be judged in its unique circumstances to

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[44] *See also Lynch*, 465 U.S. at 680 (describing *Stone* and *Epperson* as cases in which this Court invalidated laws "motivated wholly by religious considerations").

[45] To this point, the *Widmar* Court noted several cases in which state action was held to be constitutional, despite benefits to religious organizations. *Roemer v. Maryland Board of Public Works*, 426 U.S. 736 (1976) (aid to institutions of higher education, including institutions affiliated with religious sects); *Hunt v. McNair*, 413 U.S. 734 (1973) (issuance of state revenue bonds for church-affiliated college); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing laws).

determine whether it [endorses] religion." *County of Allegheny*, 492 U.S. ___, ___, 109 S.Ct. 3086 (1989) (citing *Lynch*, 465 U.S. at 694). Over thirty student clubs and organizations are in existence at WHS, covering a wide range of student interests. In fact, WHS students are told that they can *initiate* and organize clubs. (J.A. 221-222). "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274; *Texas Monthly*, 489 U.S. at ___, 103 L.Ed. 2d at 14. With such a "broad spectrum" of student clubs and organizations at WHS, School Officials, by allowing the Bible Club to meet, would not be "conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*."[46] *County of Allegheny*, 492 U.S. ___, 109 S.Ct. at 3101 (*quoting Wallace v. Jaffree*, 472 U.S. at 70).

The School Officials' argument that WHS students specifically, and secondary school students in general, are more impressionable than university students, and would view an accommodation of the Bible Club as endorsement of one religion over another is not valid. This assumption of impressionability was investigated in detail by Congress in its consideration of the EAA and was rejected.[47] After observing the

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[46] *See also Aguillard*, 482 U.S. at 593 ("*preference*" for particular religious beliefs constitutes an endorsement of religion); *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring) ("The fullest realization of true religious liberty requires that government . . . effect no *favoritism* among sects or between religion and nonreligion").

[47] The Senate Judiciary Committee found it a false assumption "that students will *not* perceive a ban on all extracurricular religious speech as State hostility toward religion," and went on to find that "the clear message that the blackout of religious speech and ideas sends to students is that the State is hostile to religion." S.Rep. No. 357, 98th Cong., 2d Sess. 10, 19 (hereafter S.Rep. No. 357). Congress, in enacting the EAA, made explicit findings of fact in support of the legislation. "To the extent 'legislative facts' are relevant to a judicial determination, Congress is

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maturity and capabilities of the students who testified, as well as psychological information related to impressionability, the Senate Committee on the Judiciary found that "students below the college level are capable of distinguishing between State-initiated, school sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S.Rep. No. 357, *supra* fn. 50, at 35.[48]

In addition to legislative fact finding, the students presented expert testimony refuting the impressionability argument. Dr. David Moshman, a child psychologist, testified that students at the age of eleven or twelve have reached the final stage in the development of cognitive reasoning and are fully capable of understanding differences between state endorsed religious activity and student-initiated religious activity. (J.A. 390-391; 399). In fact, Dr. Moshman stated that by the time students reach age twelve, they are capable of understanding

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well equipped to investigate them, and such determinations are of course entitled to due respect." *Katzenbach v. Morgan*, 384 U.S. 641, 667 (1966). In *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), this Court held that those challenging legislative judgment must persuade the Court that legislators could not reasonably believe the facts on which they based their judgment. *Id.*, at 464. *See also Eastland v. United States Servicemen's Fund*, 221 U.S. 491 (1985) (the power to investigate is inherent in the power to legislate).

[48] For example, Bonnie Bailey testified before the Committee and said:

> We have been taught that the Constitution guarantees us freedom of speech. But we feel that here we have been discriminated against, because we can picket, we can demonstrate, we can curse, we can take God's name in vain, but we cannot voluntarily get together and talk about God on any part of our campus, inside or out of the school.
>
> We just feel frustrated because we don't feel like we are being treated equally.

Hearing Before the Senate Committee on the Judiciary on S.815 & S.1089, 98th Cong., 2d Sess., April 28, 1983 and August 3, 1983 at 37.

concepts of hostility and discrimination, and that the exclusion of a religious club from a forum generally open to other clubs would result in a student perception of hostility toward religion. (J.A. 392-394, 397, 399). Finally, two WHS students who would *not* have participated in the Bible Club testified that they would not view the existence of such a club at WHS as the promotion of religion, nor would they feel compelled to attend the meetings. (J.A. 211-12, 214-15).

Based on the unrebutted expert testimony, the students' testimony and the format of the clubs at WHS, the district court correctly held that high school students are not more impressionable than college students and that they are capable of making religious sponsorship distinctions. *Mergens*, Slip Op. at 11 n.1. The eighth circuit concurred in this finding, taking note that Congress, in passing the EAA, made the same finding. *Mergens*, 867 F.2d at 1080 n.2. The students at WHS are quite capable of distinguishing between student expression and school endorsement.

This Court has recognized that high school students are able to distinguish student speech from school endorsed speech. In *Tinker*, students did not perceive a fellow student's protest of the Vietnam War as endorsed by the school. Likewise, a student's refusal to salute the flag because of religious convictions was not perceived as the school's endorsement of the student's religious or political views. *Barnette, supra*. The utilization of the Bible as history or literature in a class at public school does not imply endorsement of the Bible's teachings. *Schempp*, 374 U.S. at 225. Accommodating students by granting "released time" for religious instruction off campus does not constitute the imprimatur of state approval. *Zorach, supra*. Finally, the existence of controversial books in the school library does not constitute state approval of the content. *Pico, supra*.[49] This Court's view of the free speech

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[49] Justice Powell, in *Bender*, correctly noted that "I do not believe – particularly in this age of massive media information – that the few years difference in age between high school students and college justifies departing from Widmar." *Bender*, 474 U.S. at 556 (Powell, J., dissenting).

rights of high school students does not change merely because religious speech is involved.

3. An Equal Access Policy Does Not Foster Excessive Government Entanglement With Religion.

Permitting a voluntary, student-initiated Bible Club to meet during noninstructional time does not foster an excessive government entanglement with religion. Enforcing a ban against religion at WHS would prove to be far more entangling than a neutral policy of equal access. *Widmar*, 454 U.S. at 272 n. 11. In rejecting the entanglement argument, the *Widmar* Court observed that the "University would need to determine which words and activities fall within 'religious worship and religious teaching.' This alone could prove 'an impossible task in an age where many and various beliefs meet the constitutional definition of religion.'" *Widmar*, 454 U.S. at 273 n.11 (*quoting O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979)).[50]

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[50] *Walz v. Tax Commission*, 397 U.S. 664, 674-75 (1970) (granting tax exemptions to churches gives rise to a lesser governmental involvement than would taxing it); *Cantwell*, 310 U.S. at 305 (requiring official determination of what is and what is not a "religion" violates the First Amendment).

Sen. Levin spoke directly to the entanglement prong of the *Lemon* test and observed:

> Critics of the Hatfield amendment are concerned that it will force school officials to become involved in delicate decision making about whether groups should be permitted to meet because of the religious content of their speech. This argument is faulty for two reasons. First, it is precisely because the law is in the state of chaos that legislation is needed in order to clarify what is and what is not permitted under the first amendment. Second, school officials are now being forced to make difficult decisions each time students request to meet when the subject of the meeting could be religion. For example, if a student-initiated group requests the

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In view of the nature of the activity permitted under the EAA and the *de minimis* amount of school supervision needed to implement it, no serious contention can be made that the Act creates excessive entanglements.[51] Likewise, as was established at trial, teacher involvement in WHS clubs constituted custodial monitoring. (J.A. 92, 111-12, 123-24, 184, 247). The presence of a teacher at the Club meeting as a custodial monitor is the kind of "limited and incidental entanglement between church and state authority [that] is inevitable in a complex modern society" and certainly does not constitute an excessive entanglement forbidden by the Constitution. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 736, 747 (1976).

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> use of school premises to talk about "moral issues," school officials would have to make further inquiries before granting the request. Will the group be discussing philosophy or theology? If the students plan to talk about religion, should the school deny the request? Clearly, school officials already face difficult decisions. The Hatfield amendment will make their job easier.

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin). *Accord, id.* at S8348 (remarks of Sen. Danforth); *id.* at S8363 (remarks of Sen. Mitchell).

Since § 4071(e) of the Act states that it does not authorize the Federal government to deny or withhold federal financial assistance to any school, no contention can be made that the Act creates *Federal* government entanglement with student-initiated religious groups.

[51] Representative Goodling stated:

> There are some who say the bill makes school administrators decide what is religion. That is totally wrong. This bill does not create such entanglement with religion. This bill applies to all noncurricula meetings, regardless of whether religious or not. So there is no entanglement with religion because school administrators will make their decisions governing

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In short, neither a policy of equal access nor the Equal Access Act violates the Establishment Clause.

CONCLUSION

For these reasons, the Court should affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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(Continued from previous page)

such meetings for all noncurricula-related meetings, religious or otherwise.

130 Cong. Rec., H7732 (daily ed. July 25, 1984).

No. 88-1597

(26)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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61 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that, under the Equal Access Act, 20 U.S.C. 4071-4074 (Supp. V 1987), Westside High School has a "limited open forum," and thus must provide its students "equal access" to school facilities for religious speech.

2. Whether the Act, so construed, violates the Establishment Clause.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statute involved	1
Statement	2
Summary of argument	9
Argument:	
I. The Equal Access Act forbids content-based discrimination against student speech in the Westside High School student club program	11
A. Religious discussion and worship are core forms of speech protected by the First Amendment, and cannot be barred from an open forum on the basis of content	11
B. The Equal Access Act ensures that student groups at covered schools will not be denied the same right to meet that the school extends to other student groups solely on the basis of the content of their speech	14
C. Westside High School has a limited open forum under the Equal Access Act	27
II. The Equal Access Act promotes the values of the Establishment Clause	30
A. Both the Equal Access Act and the Establishment Clause protect an open, neutral forum for religious and other expression	30
B. Congress's decision to require equal access to an open forum when a school permits one or more noncurricular student groups to meet does not establish religion	44
C. The Establishment Clause does not operate to suppress the activity of private individuals	47
Conclusion	48
Appendix	1a

TABLE OF AUTHORITIES

Cases: Page

Abington Sch. Dist. v. *Schempp*, 374 U.S. 203 (1963) 30, 37, 41, 42
Aguilar v. *Felton*, 473 U.S. 402 (1985) 35, 44
Bender v. *Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) 47
Bethel Sch. Dist. v. *Fraser*, 478 U.S. 675 (1986) 39
Board of Educ. v. *Allen*, 392 U.S. 236 (1968) 35, 36
Board of Educ. v. *Pico*, 457 U.S. 853 (1982) 12, 25, 35, 41
Bowen v. *Kendrick*, 108 S. Ct. 2562 (1988) 32, 36, 37
Brandon v. *Guilderland Bd. of Educ.*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) 20
Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327 (1987) 33
Committee for Public Educ. & Rel. Liberty v. *Nyquist*, 413 U.S. 756 (1973) 32, 33
Cornelius v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985) 13
County of Allegheny v. *American Civil Liberties Union*, 109 S. Ct. 3086 (1989) 34, 36-37, 38, 47
Edwards v. *Aguillard*, 482 U.S. 578 (1987) 25, 32, 33
Engel v. *Vitale*, 370 U.S. 421 (1962) 37, 42
Everson v. *Board of Educ.*, 330 U.S. 1 (1947) 36
Fowler v. *Rhode Island*, 345 U.S. 67 (1953) 13
Garnett v. *Renton Sch. Dist.*, 874 F.2d 608 (9th Cir. 1989), petition for cert. pending, No. 89-641 (filed Oct. 16, 1989) 23
Grand Rapids Sch. Dist. v. *Ball*, 473 U.S. 373 (1985) 37, 41, 42
Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 34
Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988) 7, 23, 25, 45
Healy v. *James*, 408 U.S. 169 (1972) 34, 35
Heffron v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) 13
Illinois ex rel. McCollum v. *Board of Educ.*, 333 U.S. 203 (1948) 34, 37, 38, 42
Jamison v. *Texas*, 318 U.S. 413 (1943) 12
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 41

Cases—Continued: Page

Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974) 37
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 32, 43, 44
Lubbock Civil Liberties Union v. *Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1159 (1983) 20
Lynch v. *Donnelly*, 465 U.S. 668 (1984) 31, 34, 36, 37
Madison Joint Sch. Dist. v. *Wisconsin Emp. Rel'ns Comm'n*, 429 U.S. 167 (1976) 35
Marsh v. *Alabama*, 326 U.S. 501 (1946) 12
Marsh v. *Chambers*, 463 U.S. 783 (1983) 43
McDaniel v. *Paty*, 435 U.S. 618 (1978) 11, 12, 31, 33, 35, 47
Meek v. *Pittenger*, 421 U.S. 349 (1975) 34, 43, 44
Mueller v. *Allen*, 463 U.S. 388 (1983) 34, 35, 36, 46
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943) 12, 13
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 11
Niemotko v. *Maryland*, 340 U.S. 268 (1951) 12, 13
Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 12, 45
Police Dep't v. *Mosley*, 408 U.S. 92 (1972) 13
Roemer v. *Maryland Bd. of Public Works*, 426 U.S. 736 (1976) 36
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 41
Saia v. *New York*, 334 U.S. 558 (1947) 12, 13
Schneider v. *State*, 308 U.S. 147 (1939) 34
South Dakota v. *Dole*, 483 U.S. 203 (1987) 26
Southeastern Promotions, Ltd. v. *Conrad*, 420 U.S. 546 (1975) 34
Stone v. *Graham*, 449 U.S. 39 (1980) 42
Student Coalition for Peace v. *Lower Merion Sch. Dist.*, 776 F.2d 431 (3d Cir. 1985) 3
Tilton v. *Richardson*, 403 U.S. 672 (1971) 36
Tinker v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969) 12, 13, 26, 35, 41
United States Postal Service v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981) 13
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 42
Walz v. *Tax Comm'n*, 397 U.S. 664 (1970) 32, 33, 35, 36, 39

Cases—Continued: Page

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 12, 39, 41
Widmar v. *Vincent*, 454 U.S. 263 (1981) ..... *passim*
Wisconsin v. *Yoder*, 406 U.S. 205 (1972) 12
Wolman v. *Walter*, 433 U.S. 229 (1977) 43
Zorach v. *Clauson*, 343 U.S. 306 (1952) 33

Constitutions and statutes:

U.S. Const.:
Art. III 41
Amend. I ..... *passim*
Religion Clauses 31
Establishment Clause ..... *passim*
Free Exercise Clause 12, 14, 30, 31, 47
Free Speech Clause 11, 14, 30, 46, 47
Amend. XIV 5
Neb. Const. art. I 5
Civil Rights Act, 42 U.S.C. 1983 5
Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302-1304 14
20 U.S.C. 4071 *et seq.* (Supp. V 1987) 1, 1a
20 U.S.C. 4071(a) (Supp. V 1987) 2, 9, 17, 19, 23, 32, 40, 1a
20 U.S.C. 4071(b) (Supp. V 1987) 2, 10, 17, 23, 25, 44, 45, 1a
20 U.S.C. 4071(c) (Supp. V 1987) 23, 28, 30, 1a
20 U.S.C. 4071(c)(1) (Supp. V 1987) 2, 33, 1a
20 U.S.C. 4071(c)(1)-(3) 34, 1a
20 U.S.C. 4071(c)(2) (Supp. V 1987) 2, 37, 1a
20 U.S.C. 4071(c)(3) (Supp. V 1987) 3, 37-38, 44, 1a
20 U.S.C. 4071(c)(4) (Supp. V 1987) 2, 26, 1a
20 U.S.C. 4071(c)(5) (Supp. V 1987) 2, 34, 1a
20 U.S.C. 4071(d)(1) (Supp. V 1987) 3, 2a
20 U.S.C. 4071(d)(1)-(4) 34, 2a
20 U.S.C. 4071(d)(2) (Supp. V 1987) 3, 2a
20 U.S.C. 4071(d)(4) (Supp. V 1987) 3, 2a
20 U.S.C. 4071(d)(7) (Supp. V 1987) 3, 2a
20 U.S.C. 4071(e) (Supp. V 1987) 3, 2a
20 U.S.C. 4071(f) (Supp. V 1987) 2, 27, 44, 2a

Constitutions and statutes—Continued: Page

20 U.S.C. 4072(1) (Supp. V 1987) 39, 40, 3a
20 U.S.C. 4071-4074 (Supp. V 1987) 5, 14
20 U.S.C. 4072(3) (Supp. V 1987) 2, 10, 23
20 U.S.C. 4072(4) (Supp. V 1987) 34
28 U.S.C. 2403 5
Neb. Rev. Stat. (1987):
§ 79-101(4) 42
§ 79-101(5) 42

Miscellaneous:

130 Cong. Rec. (1984):
p. 12,214 16
p. 12,222 19
p. 12,232 19
pp. 12,263-12,364 16
p. 15,003 16
p. 15,004 40
p. 19,216 ..... 28, 40
p. 19,217 ..... 15, 18, 32
p. 19,218 ..... 18, 20, 40
p. 19,219 ..... 16, 21
p. 19,221 ..... 20, 21, 22, 40
pp. 19,221-19,222 21
p. 19,222 ..... 17, 21
p. 19,223 ..... 24, 26, 28
p. 19,224 27
pp. 19,228-19,229 27
p. 19,229 18
pp. 19,230-19,231 16
p. 19,233 17
p. 19,234 ..... 16, 18
p. 19,235 ..... 15, 20
p. 19,237 ..... 15, 18, 32
p. 19,238 15
pp. 19,238-19,239 40
p. 19,239 18
p. 19,240 ..... 28, 32
p. 19,241 19
p. 19,242 ..... 15, 28
pp. 19,242-19,243 15

Miscellaneous—Continued: Page

p. 19,243 ..... 15, 19, 20, 21
p. 19,244 20
p. 19,245 ..... 15, 17
p. 19,247 18
p. 19,252 16
pp. 19,324-19,325 16
p. 19,347 18
p. 20,682 18
p. 20,933 ..... 19, 40
p. 20,936 ..... 15, 20, 40
p. 20,939 ..... 15, 18, 40
p. 20,940 18
p. 20,941 27
p. 20,942 24
p. 20,944 18
p. 20,947 18
p. 20,948 18
p. 20,951 16

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p. 758 31
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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1597

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 867 F.2d 1076. The opinion of the district court (Pet. App. B1-B30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1989. The petition for a writ of certiorari was filed on March 30, 1989, and was granted on July 3, 1989. This Court's jurisdiction rests on 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V 1987) [1] is reproduced as an appendix, *infra*, 1a-2a.

[1] All citations of the Act are to the Fifth Supplement (1987) of the United States Code.

STATEMENT

1. The Equal Access Act prohibits any public secondary school that receives federal financial assistance and maintains a "limited open forum" from discriminating against students who wish to conduct a meeting within that forum because of the content of their speech. 20 U.S.C. 4071(a).[2] A "limited open forum" exists under the Act whenever a school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b). Although the Act does not define the phrase "noncurriculum related student groups," it does define the term "meeting" to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school's curriculum." 20 U.S.C. 4072(3).

Under the Act, a school provides "equal access" to a limited open forum if the school uniformly provides that meetings within the forum are voluntary and student-initiated; are not sponsored by the school, the government, its agents or employees; and are not directed, conducted, controlled, or regularly attended by outsiders. 20 U.S.C. 4071(c)(1), (2), and (5). The Act also reserves school authority to limit access as necessary for the orderly conduct of educational activities within the school (20 U.S.C. 4071(c)(4)), and as needed in order to maintain discipline, to guard the well-being of students and faculty, and to assure that attendance at all meetings is voluntary (20 U.S.C. 4071(f)).

In addition, the Act establishes rules that limit government conduct where religious speech is concerned.

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[2] Section 4071(a) provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

Agents or employees of the government may attend religious meetings only in a "nonparticipatory" capacity. 20 U.S.C. 4071(c)(3). Moreover, a State cannot influence the form of any religious activity, cannot require any person to participate in such activity, and cannot compel any school agent or employee to attend a meeting if the content of speech at the meeting is contrary to that person's own beliefs. 20 U.S.C. 4071(d)(1), (2), and (4). Nor can a State apply the Act in violation of the constitutional rights of any person. 20 U.S.C. 4071(d)(7).

The Act does not include any express enforcement mechanism and explicitly states that it does not "authorize the United States to deny or withhold Federal financial assistance to any school." 20 U.S.C. 4071(e). The Act has been construed, however, to create implied private rights of action for declaratory and injunctive relief. *Student Coalition for Peace* v. *Lower Merion School Dist.*, 776 F.2d 431, 438-441 (3d Cir. 1985).

2. Respondents include present and former students at Westside High School (Westside or WHS) in Omaha, Nebraska.[3] At Westside, there are approximately 30 different student groups or clubs that meet after school hours in school facilities. J.A. 60. Students participate in these club activities on a voluntary basis. Pet. App. A4-A5. Student clubs may be initiated by students or faculty members, and are approved by the school. J.A. 230-231, 240-241, 290-291, 358-359. Although there are no written selection criteria, school administrators state that they approve those student activities that they believe are consistent with the "Mission & Goals" of the school district and with school board policy. See J.A. 220-221, 242, 299, 304.

The "Mission & Goals" statement of the Westside Community Schools is a broadly worded "blueprint" that records the schools' commitment to teaching academic, physical, civic, and personal skills and values. See J.A. 473-478. School Board policy is reflected in a number of

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[3] Westside received federal financial assistance at all relevant times. J.A. 58.

documents. Most notably, School Board Policy 5610 on "Student Clubs and Organizations" reiterates the Board's commitment to developing "citizenship, wholesome attitudes, good human relations, knowledge and skills." J.A. 488. In addition, Policy 5610 provides that "[s]chool-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship." *Ibid.* All Westside clubs currently do have faculty sponsors. J.A. 60.

Also pertinent is School Board Policy 6180 on "Recognition of Religious Beliefs and Customs." J.A. 462, 350-352. That policy requires that "[s]tudents adhering to a specific set of religious beliefs or holding to little or no belief shall be alike respected." J.A. 462. In addition, in School Board Policy 5450, the Board recognizes its students' "Freedom of Expression," consistent with the full authority of the Board. J.A. 489.

In January 1985, respondent Bridget Mergens requested permission to form a club for religious fellowship at Westside. The proposed club would be identical in its terms and conditions to other Westside student clubs, except that the proposed club would not have a school sponsor. J.A. 59. According to the students' testimony at trial, the club's purpose would have been, among other things, to allow the students to have fellowship, to read and discuss the Bible, and to pray together. J.A. 72, 116, 143, 163, 181. Membership would have been voluntary and open to all students regardless of religious affiliation. J.A. 102, 144.

Westside's Principal, petitioner James E. Findley, denied Mergens' request for permission to form a religious club. He later reaffirmed that denial after conferring with the Associate Superintendent of Schools (petitioner James A. Tangdall) and the Superintendent of Schools (petitioner Kenneth K. Hansen). J.A. 59. According to their testimony at trial, these officials agreed that Mergens' request for a religious club had to be denied because school policy required that student clubs have a sponsor, which the religious club would not or could not

have,[4] and because a religious club at the school would violate the Establishment Clause. J.A. 80-81, 111, 244-246, 312-313, 345-352.

Mergens appealed the denial of access to the Westside Board of Education. The Board unanimously voted to uphold the denial. J.A. 22.

3. The student respondents then brought this suit in the United States District Court for the District of Nebraska. They asserted that the actions of the Westside School Board and Westside school officials violated the Equal Access Act, 20 U.S.C. 4071-4074, and infringed their rights to free speech, the free exercise of religion and nonestablishment, and the freedoms of assembly and association guaranteed them by the First and Fourteenth Amendments. See J.A. 26-32.[5] The United States intervened in the action pursuant to 28 U.S.C. 2403 to defend the constitutionality of the Act.

In a bench trial, the student respondents maintained that Westside High School maintained an "open forum," in both the statutory and constitutional sense, from which they had been discriminatorily excluded because of the religious content of their speech. The students identified ten student clubs at Westside as "noncurriculum related" for purposes of the Equal Access Act. Those clubs included a chess club, Subsurfers (a scuba diving club), the photography club, and Interact and Zonta (two service clubs affiliated respectively with Rotary International and Zonta International).[6] J.A. 60. Through their own

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[4] Petitioner Findley testified that he believed the Equal Access Act would prohibit the school from appointing a sponsor for the religious club. J.A. 244.

[5] Among other claims, the students also asserted that petitioners' actions violated Article I of the Nebraska Constitution, and the Civil Rights Act, 42 U.S.C. 1983. J.A. 29-30.

[6] The other clubs or activities included the National Honor Society, Welcome to Westside, Future Business Leaders of America, Student Advisory Board, and Student Forum. J.A. 60. The students specified that their list of ten was not intended to be an exhaustive list of the noncurriculum related student clubs at Westside. *Ibid.*

testimony (see, *e.g.*, J.A. 92, 167-168, 182-183, 190-191, 197-199, 212-214), the testimony of school officials (see, *e.g.*, J.A. 220-224, 231-233, 300-306), and the testimony of an expert witness (J.A. 400-418), the students sought to prove that none of these clubs had a direct connection to any class at Westside.

The students also challenged the school's "sponsorship" policy as one in name only, asserting that faculty sponsors frequently functioned only as monitors.[7] Finally, the students testified to their ability to differentiate an equal access policy from school endorsement or sponsorship of religious speech occurring within a student club. J.A. 189, 212, 215. To support their testimony in this regard, the students called an expert witness who testified that Westside students could perceive content-based exclusion of religious clubs as state hostility toward religion, but would be unlikely to mistake equal access as official endorsement of a club's religious speech. J.A. 396-400.

For their part, petitioners argued that, notwithstanding the substantial number of student organizations, Westside had not created a "limited open forum" for student clubs because Policy 5610 requires all student clubs to be school sponsored and because none of the many organizations and clubs allowed to meet is noncurriculum related. With respect to school sponsorship, school officials testified that the school requires sponsors to be actively involved in directing each club and in ensuring that each student activity includes a balanced presentation of issues. J.A. 245-248, 250-251, 255, 273-274, 286. With respect to whether any student clubs at Westside are "noncurriculum related," school officials sought to explain how each club is related to a specific class at Westside or furthers the school's "mission and goals" in some other way. See, *e.g.*, J.A. 220-238, 319-321, 442-449.

[7] See, *e.g.*, J.A. 92-93 (Drama club), 111-112 (general description); cf. J.A. 182-183 (Computer club), 167 (Subsurfers), 214-215 (role of sponsor of Future Business Leaders of America limited to discipline and fundraising). According to school officials, sponsors "would be actively involved at one point" (J.A. 239, 250-251), but would have differing amounts of involvement thereafter (J.A. 260).

School officials also testified that, in their professional judgment, Westside students are sufficiently impressionable that they might mistake equal access for a religious club as school endorsement of the club's religious speech in violation of the Establishment Clause. J.A. 282, 424-425, 435-438.[8]

4. The district court entered judgment for petitioners. Pet. App. B1-B30. It held, first, that the Equal Access Act is inapplicable in this case because Westside High School has no "noncurriculum related" clubs. All Westside clubs, the district court concluded, were "curriculum related and tied to the educational function of the institution." Pet. App. B25-B26.[9]

The district court next held that the students had not proved their claim under the First Amendment because Westside's denial of access to the proposed club was " 'reasonably related to legitimate pedagogical concerns'." Pet. App. B27, B28 (quoting *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988)).[10] As articulated by

[8] School officials noted that the students could discuss the Bible informally at school before, during, and after school hours and that the students probably could have met on their own for that purpose if they had not requested permission to form a club. J.A. 315-316, 371-373, 430-431, 438-440. When asked to elaborate on this point, however, the school officials stated that they would have prohibited the students from meeting to discuss religious topics if the meetings were to be "regular" or "planned" (J.A. 373-374, 452), or if the students wanted to make their meetings known to other students or invite others to the meetings (J.A. 431-433). The students requested permission for a religious club because they desired "regular," "planned" meetings and because they did not want to "sneak[] around behind the administration's back." J.A. 112-114.

[9] The district court thus found it unnecessary to reach the issue of the Act's constitutionality, although it did conclude that Westside students were no more likely to mistake equal access for religious speech as school sponsorship of religion in the context of Westside's student club program than were the university students in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Pet. App. B11-B12 n.1.

[10] The district court applied this standard because it found that Westside had not created a "limited open forum" for student clubs

Westside administrators, those concerns involved "the school's goal of presenting a balanced view when political, religious and economic information is dispensed within WHS facilities" (Pet. App. B28), concerns which the administrators assumed a religious club could not meet (J.A. 255, 313).

The United States Court of Appeals for the Eighth Circuit reversed. Pet. App. A1-A21. It held that the trial court erred in concluding that all existing student clubs at Westside were curriculum-related. The court noted that the "broad interpretation" of that concept advanced by Westside administrators "would make the [Equal Access Act] meaningless" and would allow any school "arbitrarily [to] deny access to school facilities to any unfavored student club on the basis of its speech content," which was "exactly the result Congress sought to prohibit by enacting the [Act]." Pet. App. A10-A12. Rather, the Eighth Circuit found that "[m]any of the student clubs at WHS, including the chess club, are noncurriculum-related." The court therefore concluded that Westside maintains "a limited open forum, and the [Equal Access Act] forbids discrimination against [respondents'] proposed club on the basis of its religious content." Pet. App. A14.

The Eighth Circuit next rejected petitioners' argument that the Equal Access Act violates the Establishment Clause. Pet. App. A14-A20. The court observed that the language of the Act "closely tracks the holding of the Court in *Widmar* [v. *Vincent*, 454 U.S. 263 (1981),]" where this Court upheld the constitutionality of equal access for student religious speech at the university level. Pet. App. A19. The court concluded that "[a]ny constitutional attack on the [Act] must therefore be predicated on the difference between secondary school students and university students." *Ibid.* The court of appeals determined in turn that any such difference had no constitutional significance "because Congress considered the difference in the maturity level of secondary students and university students before passing the [Act]," and because the court accepted Congress's fact-finding. Pet. App. A19-A20.

Finally, the Eighth Circuit ruled that it would reach the same result "under *Widmar* alone" even if Congress had never passed the Act, since the "facts in the case before us today are the same as the facts in *Widmar* except for the setting." Pet. App. A20.

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under the First Amendment definition of that concept set forth in *Widmar* v. *Vincent*, *supra*. Pet. App. B26-B27.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be affirmed. Westside High School's decision to permit voluntary, noncurriculum student clubs to meet after hours on school premises brought it within the scope of the Equal Access Act, and the school's decision to exclude respondents' Bible study club violated the nondiscrimination mandate of the Act. The Act is fully consistent with the Establishment Clause. It does not establish religion but simply affords equal access to an open forum without regard to the "religious, political, philosophical, or other content" of student speech. 20 U.S.C. 4071(a). The Establishment Clause itself was envisioned by the Framers as promoting the same values of equal access, by ensuring that no official orthodoxy would operate to block access by any religion to the open forum of American society.

Congress passed the Equal Access Act by overwhelming bipartisan majorities in response to widespread reports that public secondary schools were actively discriminating against religious speech. Congress learned that schools often permitted students to form clubs to meet after hours on school premises to pursue whatever interested them—so long as it was not religion. In the Equal Access Act, Congress sought to promote student free speech by specifying that any school that accepted federal financial assistance and had a "limited open forum" could not deny "equal access" to that forum on the basis of the content of the student speech. To provide clear guidance, to eliminate confusion in the law, and to fore-

stall costly and divisive litigation, Congress further specified that a school had such a "limited open forum" whenever it permitted "one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b).

Westside has a limited open forum under the Act. Some 30 student clubs meet at Westside during noninstructional time. Petitioners contend that every one of these clubs is related to the school's educational mission, and therefore that none is "noncurriculum related." Congress did not intend the Act to be such an empty response to the real problem it perceived. The language of the statute and its history indicate that a club is noncurriculum related not only when a school says so, but when it is not "directly related" (20 U.S.C. 4072(3)) to the courses the school offers—its curriculum. The noncurriculum related clubs at Westside include the chess club and several community service clubs—Peer Advocates, Interact (connected with Rotary International), and Zonta. If the Act is to have any meaning, these clubs cannot reasonably be viewed as "directly related" to the curriculum at Westside.

Permitting equal access to *all* speech without regard to content does not establish religion. In *Widmar* v. *Vincent*, 454 U.S. 263 (1981), this Court held that permitting equal access for religious speech to a university's open forum did not contravene the Establishment Clause. In passing the Equal Access Act, Congress made specific findings that secondary school students—no less than university students—were able to comprehend the basic principle that free speech in an open forum is not state-sponsored speech, and the district court made similar findings in this case. The Act protects an open forum for individuals and groups to speak as *they* choose, and such individual choices do not constitute state establishment of religion.

Congress triggered coverage under the Act whenever a school accepting federal financial assistance permits one or more noncurriculum clubs to meet. This standard may, in particular cases, impose nondiscrimination require-

ments on schools that did not previously have open forums under *Widmar*. Congress provided a precise definition of "limited open forum" to provide clear guidance to school officials and students. But *Widmar*'s Establishment Clause analysis remains fully applicable. Under this Court's precedents, a limited open forum may be established by policy as well as by practice. The effect of the Act is to establish such a forum by policy at secondary schools where the triggering standard—one or more noncurriculum clubs—is met. Given such an open forum policy, *Widmar* teaches that permitting equal access to religious speech does not violate the Establishment Clause.

ARGUMENT

I. The Equal Access Act forbids content-based discrimination against student speech in the Westside High School student club program

A. Religious discussion and worship are core forms of speech protected by the First Amendment, and cannot be barred from an open forum on the basis of content

Congress considered and passed the Equal Access Act against the backdrop of the core constitutional values of free speech and the free exercise of religion. The students in this case sought access to school premises during noninstructional time to form a Bible study club. They regarded this activity as an important part of the practice of their religous beliefs.[11] The speech that Westside school officials saw fit to exclude was thus doubly protected under the Constitution.

First, religious speech enjoys the "full measure of protection" afforded by the Free Speech Clause to other types of speech. *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment). Religious ideas, "no less than any other, may be the subject of debate which is 'uninhibited, robust, and wide-open . . . .'" *Id.* at 640 (quoting *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964)). Cases involving religious speech,

[11] See J.A. 117, 190, Tr. 166, 230.

in fact, have provided the formative materials out of which this Court has fashioned many of the basic principles of free speech doctrine.[12]

Second, the Free Exercise Clause requires that government accommodate the "freedom to develop and preach religious ideas and practices." *McDaniel*, 435 U.S. at 638 (Brennan, J., concurring in the judgment). Like freedom of speech and freedom of the press, freedom of religion occupies a "preferred position" in our constitutional system. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 109, 115 (1943). Where the right to the free exercise of religion is infringed by the prohibition of religious activities, the State must demonstrate that the prohibition is necessary to serve state interests "of the highest order." *McDaniel*, 435 U.S. at 628 (quoting *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972)).

The fact that Bridget Mergens and her fellow students sought to exercise their First Amendment rights on public school property does not abrogate these basic constitutional protections.[13] Under this Court's analysis, the amount of protection provided speech on government property depends on the nature of the forum in which the speech occurs. Places which "by long tradition or by government fiat have been devoted to assembly and debate"—like public parks and streets—are "public forums." *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). A State may exclude speakers from a public forum because of the content of their speech only when the exclusion is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Ibid.* Similarly, a State may decide to open government property to the public or some segment of it for

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[12] See, *e.g.*, *Jamison* v. *Texas*, 318 U.S. 413 (1943); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Marsh* v. *Alabama*, 326 U.S. 501 (1946); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1947).

[13] See, *e.g.*, *Board of Educ.* v. *Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

use as a place for expressive activity. Although nothing in the Constitution requires the States to establish such forums or to retain indefinitely their open character, so long as a State does so these limited public or "open forums" are subject to the same restrictions that apply to their traditional counterparts: speakers cannot be excluded absent a compelling state interest. *Id.* at 46; *Widmar* v. *Vincent*, 454 U.S. 263, 269 (1981); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). Finally, a State may restrict access to a nonpublic forum as long as the restrictions are reasonable, and are not intended to suppress a particular point of view. *Cornelius*, 473 U.S. at 800.[14]

The "fundamental principle" of the public forum is that state regulation of speech must be content-neutral. *Widmar*, 454 U.S. at 277. That tenet reflects our Nation's deep-seated conviction that there is an "'equality of status in the field of ideas.'" *Police Dep't* v. *Mosley*, 408 U.S. 92, 96 (1972) (citation omitted). Once it has opened a forum to expressive activity, the "government must afford all points of view an equal opportunity to be heard." *Ibid.* In light of the special care with which the Founders guarded religious speech, it was long assumed that free speech rights of access to an open forum extended *a fortiori* to religious expression. See, *e.g.*, *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Saia* v. *New York*, 334 U.S. 558 (1948); *Murdock*, *supra*.

This Court confirmed that assumption in *Widmar* v. *Vincent*, *supra*. There, the Court held that a public university's practice of excluding religious speech from its limited open forum violated the First Amendment. The university had contended that its exclusionary policy was justified by the State's compelling interest in complying with the Establishment Clause. This Court held instead

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[14] Discrimination based on viewpoint is prohibited without regard to the nature of the forum. See, *e.g.*, *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Tinker*, 393 U.S. at 510-511.

that "an 'equal access' policy" affording student religious groups the same rights to meet enjoyed by other student groups would not run afoul of the Establishment Clause, and was indeed mandated by the Free Speech Clause. 454 U.S. at 267-271.[15]

B. The Equal Access Act ensures that student groups at covered schools will not be denied the same right to meet that the school extends to other student groups solely on the basis of the content of their speech

1. Against this constitutional background, Congress considered and passed the Equal Access Act, Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302-1304, 20 U.S.C. 4071-4074. The Act was prompted by widespread reports of discrimination directed against religious speech that persisted in the Nation's schools even in *Widmar*'s wake.[16] According to extensive findings in the reports on earlier versions of the Act[17] and as emphasized in the de-

[15] The students' complaint in this case alleged that the Westside school officials violated their rights under the Equal Access Act, the Free Speech Clause, and the Free Exercise Clause. For the reasons set forth below, the school officials violated the Act, and the Act does not contravene the Establishment Clause. The Court therefore need not reach the students' Free Speech and Free Exercise claims in order to decide this case.

[16] The extent of the discrimination was detailed in seven days of hearings. See *Equal Access: A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 37-84 (1983) [hereinafter *Hearings on S. 185 and S. 1059*] (student/faculty panel); *id.* at 141-154, 168-172; *Hearings on the Equal Access Act: Hearings on H.R. 2732 Before the House Comm. on Education and Labor*, 98th Cong., 1st Sess. 16-17 (1983) [hereinafter *Hearings on H.R. 2732*] (faculty representative); *id.* at 35-40 (student/faculty representatives); *Religious Speech Protection Act: Hearing on H.R. 4996 Before the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 53-57 (1984) [hereinafter *Hearing on H.R. 4996*] (student representative).

[17] Congress sought "to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and freedom of religion" accruing to secondary school students who desired to exercise those rights during extracurricular periods when other activities were permitted by the school. S. Rep. No. 357, 98th Cong., 2d Sess. 3 (1984); see also *id.* at 11-21 (reviewing instances of discrimination, need for clarification of the law); H.R. Rep. No. 710, 98th Cong., 2d Sess. 1-2 (1984) (reviewing purpose to eliminate discrimination); *id.* at 3-6 (noting widespread misunderstanding of law, need for clarification).

bates,[18] Congress acted to eliminate official "hostility" towards religious expression in the public schools that had led to the suppression of religious speech. S. Rep. No. 357, 98th Cong., 2d Sess. 11 (1984). Congress found that school officials across the Nation—driven by rigid readings of this Court's Establishment Clause cases and fears of aggressively separationists litigation—had singled out religious liberty for discriminatory treatment. Their suppression of free religious speech fueled the "tragic perception that the government is affirmatively hostile to reli-

[18] As Senator Hatfield, co-sponsor of the version of the bill eventually enacted, said of his bill, "where there is an action that is taken by [a school board] * * * which denies a right that is guaranteed under the Constitution, then the Congress of the United States, I think, has a duty and an obligation to step in and remedy that violated right." 130 Cong. Rec. 19,217 (1984). The debates are replete with like statements. See, *e.g.*, *id.* at 19,235 (Sen. Levin) ("it is a gross intrusion now, that the status quo right now has State officials, teachers, and administrators, making judgments and characterizations on what constitutes religious speech after school because many are told that is something which they must prohibit"); *id.* at 19,237 (Sen. Bumpers) ("what this equal access amendment will guarantee, is that there be no official hostility toward religion, and that the schools not discourage or discriminate against the free exercise of religion"); *id.* at 19,242 (Sen. Mattingly) ("[The Act] would put religious speech on an equal footing with other types of speech in America's public schools. * * * Schools today are being hostile toward religion. Not neutral, but plainly antagonistic."); *id.* at 19,242-19,243 (Sen. Jepsen) ("[testimony in the hearings showed that] the state has been perceived [by students] as being hostile toward religion. * * * We must * * * restore students' first amendment rights of free speech and free exercise of religion. We must not continue to discriminate * * *. We must eliminate the antireligious bias that has permeated the public school system."); *id.* at 19,243 (Sen. Dole) (erroneous circuit court decisions have "forced [schools] into a posture of being hostile" to religion); see also *id.* at 19,238 (Sen. Durenberger); *id.* at 19,245 (Sen. Thurmond); *id.* at 20,936 (Rep. Lott); *id.* at 20,939 (Rep. Jeffords); *ibid.* (Rep. Nielson).

gious expression." S. Rep. No. 357, *supra*, at 21. Congress therefore sought to clarify and confirm the right of secondary school students to engage in religious speech on the same terms as they could engage in other types of speech.

Although prompted to action by evidence of discrimination against religious speech, Congress did not grant religious speech any preferred status in the Act. Rather, the legislature's intention was to "make equal the right of freedom of speech to any and all subject fields" rather than to create "special rights." [19] This is reflected in the language of the final bill.[20] Its operative section provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

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[19] 130 Cong. Rec. 19,234 (1984) (Sen. Hatfield).

[20] The Equal Access Act's predecessors included S. 425, 98th Cong., 1st Sess. (1983); S. 815, 98th Cong., 1st Sess. (1983); H.R. 2732, 98th Cong., 1st Sess. (1983); H.R. 4172, 98th Cong., 1st Sess. (1983); and H.R. 4996, 98th Cong., 2d Sess. (1984). A clean version of H.R. 4996, retitled H.R. 5345, 98th Cong., 2d Sess. (1984), was reported out of committee and debated on the floor of the House. The bill, which sanctioned those schools violating its terms with a cut-off of federal funding, failed passage under a suspension of the House rules. See 130 Cong. Rec. 12,214, 12,263-12,264 (1984). A modified version of S. 1059, 98th Cong., 1st Sess. (1983); the Equal Access Act, was offered by Senators Hatfield and Denton as an amendment to S. 1285, 98th Cong., 2d Sess. (1984) (H.R. 1310, 98th Cong., 1st Sess. (1983)), the Senate's much larger Education for Economic Security Act. 130 Cong. Rec. 15,003 (1984). On June 27, before substantial debate on the bill, Senators Leahy and Hatfield offered a perfecting amendment (modified by an addition by Senator Danforth) introducing the language later enacted. See *id.* at 19,219 (perfecting amendment); *id.* at 19,230-19,231 (perfecting amendment including Danforth modification). The Senate accepted the amendment by a vote of 88 to 11 on June 27. *Id.* at 19,252, 19,324-19,325. The Act was debated in the House under a suspension of the rules on July 25, 1984; by a vote of 337 to 77, the House concurred in the Senate amendment to H.R. 1310. *Id.* at 20,951.

20 U.S.C. 4071(a). The next section defines "limited open forum":

> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

20 U.S.C. 4071(b).

Reports and debates on earlier versions and the final version of the Act reflect a general intent to extend the principles enunciated by this Court in *Widmar* to public secondary schools. As Senator Hatfield explained, nothing in the Act requires schools to permit any student activities outside of the formal instructional activities of the school:

> We are not directing the school to set up such a forum. We are merely recognizing that the schools do have them in many instances. * * * For those that do have, what we are saying is that once this school establishes that forum, and borrowing from the Court in the Widmar case * * *, once the school sets up that forum it should not discriminate as to the content of the speech in that forum.

130 Cong. Rec. 19,222 (1984). As Senator Thurmond put it:

> To deny the * * * utterance of religious speech on school property while allowing other forms of protected speech, is to violate the first amendment * * *. The Supreme Court has already made this principle applicable to publicly supported colleges and universities in the Widmar case. It is now time for Congress to extend this protection to the public school systems of this Nation.

Id. at 19,245.[21] Representative Goodling, who along with

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[21] Senator Hatfield, co-author of the final language, reiterated that view. See 130 Cong. Rec. 19,233 (1984) ("We have cases that have denied students the rights to express a viewpoint on the subject of religion where they can do so on any other subject. * * * [T]his case has been settled on higher education campuses, and it has been settled in favor of my position. At the [university at issue in *Widmar*,] * * * officials said students can have a voluntary

Representative Perkins ushered the Senate amendment through the House, agreed:

> All we are saying is that since the Supreme Court has not acted at this point, since there is controversy in the lower courts, there should be some guidelines for the school district so they know where they stand.
>
> Most of them are continuing to operate today just as this legislation says they are allowed to operate. So we are not asking for anything new. We are not asking for anything more.

Id. at 20,682.[22]

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organization to meet on any subject but religion. The Supreme Court said no. Once the university established the right of [a] forum they cannot dictate the content of the forum without violating the freedom of speech."); *id.* at 19,218 ("We could sit back and wait until some court case is appealed to the Supreme Court, and the Supreme Court, under the precedent of the Widmar case—I am not a lawyer, but I would predict that the Court would rule in the same way when it related to a secondary school. Madam President, that is the basic philosophy of this amendment; that is the bottom line."); *id.* at 19,217 ("you can equally present this case as purely a matter of freedom of speech[.] * * * When the Supreme Court * * * decided [*Widmar*] * * * they stated * * * that once an institution sets up the right of a forum, that institution cannot dictate the content of the forum without violating the freedom of speech.").

See also 130 Cong. Rec. 19,237 (1984) (Sen. Levin) ("once a university has opened its facilities for use by student groups, it cannot exclude specific groups because of the religious content of their speech. This amendment seeks to codify that principle at the secondary school level."); *id.* at 19,239 (Sen. Biden) (bill applies *Widmar* prohibition of exclusion once "school has created a forum that is generally open to student groups" at secondary school). For statements in a similar vein, see *id.* at 19,229 (Sen Denton); *id.* at 19,234 (Sen. Hatfield); *id.* at 19,241 (Sen. Nickles); *id.* at 19,247 (Sen. Grassley); *id.* at 19,347 (Sen. Specter); *id.* at 20,939 (Rep. Neilson); *id.* at 20,940 (Rep. Coats); *id.* at 20,944 (Rep. McEwen); *id.* at 20,947 (Rep. Darden); *id.* at 20,948 (Rep. Perkins).

[22] Earlier incarnations of the Act were constant in their aim to "codify" *Widmar*. "The standard of 'equal access' was used by the Supreme Court in *Widmar* v. *Vincent* to describe the free speech principle safeguarded by [the Act's operative provision]. * * * In [that provision], as in the Supreme Court decision, the

Faithful to the "equal access" theory underlying *Widmar*, Congress adopted language in the final bill to clarify that the bill was not giving religious speech a preferred position. While the Act was prompted by evidence of discrimination against religious expression, Congress expressly protected "political, philosophical, or other" speech as well. 20 U.S.C. 4071(a).[23]

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guarantee of equal access means that religiously oriented student activities of an extracurricular nature would be allowed under the same terms and conditions as other extracurricular activities." S. Rep. No. 357, *supra*, at 38-39 (footnote omitted); see also, *e.g.*, *id.* at 3, 5-11, 23, 29, 33-36; H.R. Rep. No. 710, *supra*, at 1-4, 6-7; *Hearings on S. 815 and S. 1059*, *supra*, at 3-4, 8-10, 15-16 (Sens. Thurmond, Hatfield explaining bill as application of *Widmar*), 26 (Sec'y of Educ. Bell) (same), 19-20 (letter from L. Tribe opining that S. 815 constitutional as application of *Widmar*); *Hearings on H.R. 2732*, *supra*, at 3, 8, 12 (similar statements by Reps. Lott (sponsor), Bartlett); *Hearings on H.R. 4996*, *supra*, at 5, 10, 116-117 (similar statements by Sen. Hatfield, Reps. Bonker (sponsor), Perkins, Goodling).

[23] Earlier versions of the Act specifically safeguarded religious speech. See S. 425, 98th Cong., 1st Sess. § 2(b) (1983); S. 815, 98th Cong., 1st Sess. § 3 (1983); H.R. 2732, 98th Cong., 1st Sess. § 2(b) (1983); H.R. 4996, 98th Cong., 2d Sess. § 3 (1984); H.R. 5345, 98th Cong., 2d Sess. § 3 (1984); S. 1059, 98th Cong., 1st Sess. § 3(b) (1983). At the hearings, legal scholars recommended expanding the language. Professor Tribe confirmed, in his view, the constitutionality of the bills' focus on religious speech, given their goal to redress religious discrimination. He recommended against removing the specific protection of religious speech because of the possibility that the bill could then be interpreted to *exclude* protection for it. *Hearing on H.R. 4996*, *supra*, at 47-50. However, in light of the potential Establishment Clause challenges to such language, Tribe suggested that Congress clarify its "equal access" premise by confirming that free speech protection extends to all speech, regardless of its religious, " 'political,' * * * 'or other content.' " *Id.* at 50. See also *Hearings on H.R. 2732*, *supra*, at 139-140 (Prof. A. Loewy).

H.R. 5345 was criticized on similar grounds in the House. See, *e.g.*, 130 Cong. Rec. 12,222 (1984) (Rep. Frank); *id.* at 12,232 (Rep. Shannon). According to these and other critics, the Hatfield/Leahy perfecting amendment successfully clarified the premise of the Act. See, *e.g.*, *id.* at 19,243 (Sen. Mitchell); *id.* at 20,933 (Rep. Frank) (supporting passage).

At the same time, however, Congress was troubled about continuing confusion and uncertainty in the state of the law. The legislature's decision to act in the first place was prompted in part by a desire to eliminate such confusion. Congress found that the discriminatory suppression of religious speech by school administrators was occasioned not so much by "malice" as by their "misunderstanding" of existing law.[24] Expressing confidence in the eventual resolution of the issue by this Court,[25] Congress nevertheless decided to correct present violations and to forestall further costly and divisive litigation.[26]

In view of this background, Congress was concerned not to perpetuate uncertainty and confusion through its choice of imprecise statutory language. The legislators thus carefully focused on and refined that language, making it highly specific. The penultimate version of the bill tracked the language of this Court's decision in *Widmar*, specifying that the Act was triggered whenever a school implemented a "policy or practice which generally permits students or groups of students, or both, to engage in voluntary extracurricular activities" on school prem-

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[24] 130 Cong. Rec. 20,936 (1984) (Rep. Lott). In particular, Congress found that misunderstanding was fueled by lower court decisions which erroneously concluded that public schools could not have "public forums" for purposes of the Establishment Clause. See, *e.g.*, S. Rep. No. 357, *supra*, at 6-11 (criticizing rationale of courts in *Brandon* v. *Guilderland Bd. of Educ.*, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981), and *Lubbock Civil Liberties Union* v. *Lubbock Indep. Sch. Dist.*, 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983)).

[25] See, *e.g.*, 130 Cong. Rec. 19,218 (1984) (Sen. Hatfield); see also *id.* at 19,221 (Sen. Leahy) ("the courts are basically doing a good job. But * * * the level of doubt and confusion on the issue of equal access impels our action now.").

[26] See, *e.g.*, 130 Cong. Rec. 19,243 (1984) (Sen. Dole) (Act necessary to clarify "what should be obvious" given hostility towards religion engendered by *Brandon* and *Lubbock* decisions); *id.* at 19,244 (Sen. Mitchell) (language to provide "clear and concise guidance to school officials"); *id.* at 19,235 (Sen. Levin); *id.* at 20,939 (Rep. Nielson); see also S. Rep. No. 357, *supra*, at 12, 14, 21 (emphasizing cost to taxpayers from litigation).

ises.[27] However, this *Widmar*-inspired language did not survive. Instead, Congress deliberately moved away from this rather general formulation in the perfecting amendment that became law, specifying that a "limited open forum" triggering the nondiscrimination protections of the Act exists at a public secondary school "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." See 130 Cong. Rec. 19,219 (1984).

This drafting change, resulting in a low triggering standard (one or more noncurriculum related groups), was by no means inadvertent. Senator Leahy—a cosponsor of the amendment—explained that the new definition was designed to remove "some lingering doubts about the specificity of one or two key concepts. One of those was the concept of the limited open forum—the very heart of the bill." 130 Cong. Rec. 19,221 (1984). Senator Leahy noted that "the language of the earlier draft might have been interpreted to allow the school's actions to differ from their words." *Ibid.* A school could, for example, assert that it did not have a limited open forum and was therefore not covered by the Act, and then consider student groups wishing to meet on a case-by-case basis, once again discriminatorily excluding religious groups. *Id.* at 19,221-19,222. As Senator Leahy concluded, "[t]he point is that a limited open forum should be triggered by what a school does, not by what it says." *Id.* at 19,222.[28]

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[27] See S. Rep. No. 357, *supra*, at 1. Compare *Widmar*, 454 U.S. at 267 (university forum "generally open for use by student groups"). See also S. Rep. No. 357, *supra*, at 38 ("Following the language of the Supreme Court in *Widmar* v. *Vincent*, the word 'generally' indicates that the policy or practice permits a variety of extracurricular activities.").

[28] Senator Dole made the same point: "Perhaps the most important improvement made by this perfecting amendment is to clarify the meaning of a 'limited open forum.' This change will preclude a school from practicing one policy toward the use of school facilities by student groups, while officially adopting another." 130 Cong. Rec. 19,243 (1984).

Under the Act as passed, therefore, if what a school does is permit one or more noncurriculum related groups to meet, then it has a limited open forum and the equal access provision of the Act is thereby triggered. The Act thus "sets forth common-sense rules to guide schools in opening their doors to these noncurriculum groups in a manner that stresses fairness and equity * * *." 130 Cong. Rec. 19,221 (1984).[29]

2. While broadly providing that a school allowing "one or more noncurriculum related student groups" to use its facilities would come within the Act, Congress declined to define the term "noncurriculum related." Seizing upon Congress's silence, petitioners here expansively argue (Pet. Br. 56-81) that all of the many student clubs at Westside High School—including the chess and service clubs—are related to the school's curriculum. This is because, according to petitioners, Congress's failure to define "noncurriculum related" reflects a deliberate decision "to allow local school officials to employ a local definition of curriculum, subject only to judicial review to insure against abuse." Pet. Br. 63.

We disagree. As the court of appeals concluded in this case, such a malleable definition of "noncurriculum related" would make the Act meaningless:

> A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.

Pet. App. A12; see also *Garnett* v. *Renton Sch. Dist.*, 874 F.2d 608, 614 (9th Cir. 1989), petition for cert. pending, No. 89-641 (filed Oct. 16, 1989). To be sure, the breadth of the concept of "curriculum" depends, as the students' expert testified at trial (J.A. 406-407), on one's theory of education. However, both the language and the purposes of the Act indicate that Congress intended a definition of "noncurriculum related" that tied it narrowly—by contrasting it immediately—to the course of studies actually offered by the school.

First, Congress did define what it meant by the "meeting[s]" (20 U.S.C. 4071(a)) that had to be accommodated under the Act. Under that definition, "the term 'meeting' includes those activities of student groups which are * * * not *directly related* to the school curriculum." 20 U.S.C. 4072(3) (emphasis added). The popular meaning of the term "curriculum" is a "fixed series of studies required * * * for graduation," or "all of the courses * * * offered in a school." *Webster's New World Dictionary* 348 (2d College ed. 1974). Congress's use of the phrase "directly related" indicates that it exempted from the "noncurriculum related" category only those clubs closely connected to courses offered by the school.[30]

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[29] We therefore do not agree with the district court's statement that "[t]he Act's applicability turns on whether or not the public secondary school has created a limited open forum, as was found by the Supreme Court to exist in *Widmar*." Pet. App. B14. Instead, the applicability of the Act turns on whether the school accepts federal financial assistance and affords an opportunity to meet for one or more noncurriculum related student groups, regardless of whether the school's actions would have created a limited open forum under *Widmar*. If the Act is triggered, then the school is considered to have established a limited open forum open to all groups without regard to the content of their speech, as provided in the Act. In contrast, focusing on whether the school had established a limited open forum under *Widmar*—without regard to the language of the Act—would reintroduce the very uncertainty and confusion Congress sought to exorcise through the perfecting amendment.

[30] Other provisions of the Act make it clear that the "noncurriculum related" activity must additionally be one that is "voluntary_ and student-initiated." 20 U.S.C. 4071(c). As Section 4071(b) itself specifies, the Act is triggered when the school "grants an offering to or opportunity for"—rather than when the school itself initiates—noncurriculum related activities. The requirement that an activity be "student-initiated" would disqualify as "noncurriculum related" those activities that are sponsored by a school as part of its administration or participation in the larger educational system—presumably including activities like yearbook groups, and participation in national contests. Cf. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. at 271 (1988).

Although not completely clear, the legislative record on balance confirms this objective test. As Senator Hatfield explained the new term:

> [By] non-curriculum-related student groups, what we are recognizing there is that in a number of schools, students in a class of Spanish or French will form a French club or a Spanish club where they get together to talk nothing but that language, to get conversational proficiency. We are recognizing that as really *a kind of extension of the classroom.* That is the kind of category of clubs that we are trying to incorporate as curriculum related, those not covered by this amendment.

130 Cong. Rec. 19,223 (1984) (emphasis added).[31] Representative Goodling suggested a similar definition of "noncurriculum related" in the House:

> First, is the subject matter * * * of a type which a public school could sponsor? In other words, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category. A young Democrat or Republican Club, private social organizations, or religious groups would not be of the type which a school could sponsor.
>
> Second, does the school or a schoolteacher require or directly encourage student participation in such group in connection with curriculum *course work*?
>
> If *both* elements of this two-part analysis are satisfied, the meeting would be considered curriculum related and the equal access policy would not be triggered.

Id. at 20,942 (emphasis added).

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[31] Senator Hatfield later expressed the same idea, albeit less clearly, when he indicated that sports activities would be "curriculum related" because "that is how [schools] can use [their] tax dollars"—to hire the coaches of the physical education department. 130 Cong. Rec. 19,223 (1984). We recognize that there are contrary indications in the legislative history. At one point, for example, Senator Gorton asked whether "the school district [would] have the full authority to determine where the line is to be drawn between curriculum related activities and noncurriculum related," and Senator Hatfield, in an effort to blunt the questioning, responded "[w]e in no way seek to limit that discretion." *Ibid.*

An interpretation of "noncurriculum related" that equates it with those clubs not directly related to courses offered by the school also accords most closely with the larger objectives of the Act. First, such a definition provides a clear and predictable guideline to students and administrators alike. Second, the definition could not be circumvented by the articulation of any "broadly defined educational goal." Rather, the definition imports a relatively uniform and predictable content into the standards for application of the equal access policy.

Finally, our construction of "noncurriculum related" furthers the objectives of the Act to protect First Amendment freedoms. The heart of a school's educational mission is in the selection and teaching of its curriculum. See *Edwards* v. *Aguillard*, 482 U.S. 578, 597 (1987) (Powell, J., concurring); *Board of Educ.* v. *Pico*, 457 U.S. 853, 869 (1982) (plurality opinion). Student activities unrelated to the courses taught by the school are presumptively outside the area the school has selected as its educational mission.[32] Therefore, the fact that a school allows students to initiate and participate in such activities can rationally be regarded as evidence that the school has adopted an "open forum" policy. Cf. *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. at 270-271 (school entitled to exercise less control over expression concerning noncurriculum related matters); *Pico*, 457 U.S. at 869 (plurality opinion) (same).

When the terms of Section 4071(b) are met—the school has opened its facilities to one or more noncurriculum related clubs—application of the Act is triggered. Without more, the statute dictates that free speech pro-

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[32] There is, in fact, some indication that Congress's selection of the word "noncurriculum" was quite deliberate. Witnesses at the hearings emphasized that the term "extracurricular" implied a connection with a school's curriculum. *Hearings on H.R. 2732, supra,* at 209 (J. Novik, ACLU); *Hearing on H.R. 4996, supra,* at 97 (D. Kelley, NCC); see also S. Rep. No. 357, *supra,* at 38 (emphasizing that protection of Act cannot extend to religious speech occurring in context of curriculum).

tections be extended to other students who wish to participate in the forum.

This plain-language construction of the statute does not intrude unduly upon the discretion of local school officials. The Act is triggered only by a local decision to accept federal financial assistance, and a local decision to permit one or more noncurricular student groups to meet. A school board desirous of excluding student religious clubs (or, for that matter, political or philosophical clubs) retains discretion, under the Act, to exclude *all* noncurricular student clubs, or to refuse federal funds.[33] It does not retain discretion to accept federal funds, open the school to one or more noncurricular clubs, and then discriminate against religious clubs on the basis of the content of their speech. The Act *does* intrude on the discretion of local school officials to that extent, which is precisely what Congress intended. See 130 Cong. Rec. 19,223 (1984) (Sen. Hatfield).

At the same time, this Court has recognized that even where an "open forum" exists on school property, educators retain the right to exclude "even First Amendment activities" that "substantially interfere with the opportunity of other students to obtain an education." *Widmar*, 454 U.S. at 277. Nothing in the statute or its legislative history indicates that Congress disagrees. The statute also specifies that the school retains the ability to prohibit meetings which "materially and substantially interfere with the orderly conduct of educational activities within the school." 20 U.S.C. 4071(c)(4).[34] In addition, Congress deliberately added a provision, now codified as Section 4071(f), to the perfecting amendment in order to confirm that "[n]othing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."[35]

[33] Nationwide, federal financial assistance accounted on average for 6.4 percent of a public secondary school's budget in 1987. In Nebraska, the figure was 6.1 percent. National Center for Education Statistics, U.S. Dep't of Education, *Public Elementary and Secondary School Revenues and Current Expenditures Fiscal Year 1987: Final Tabulations; and Fiscal Year 1986: Revised Final Tabulations*, at 7. 9 (1988). Cf. *South Dakota* v. *Dole*, 483 U.S. 203, 211 (1987) (describing as "more rhetoric than fact" argument that federal statute imposing loss of five percent of federal highway funds for failure to raise state drinking age was coercive).

[34] The language tracks that of *Tinker*. See 393 U.S. at 513.

C. Westside High School has a limited open forum under the Equal Access Act

In this case, the students persuasively demonstrated that Westside High School allows noncurriculum related clubs, and thus has a "limited open forum" within the meaning of the Act. At trial, Westside's principal acknowledged that the "Peer Advocates" program—a service program in which students worked with those enrolled in special education classes—was not directly related to the courses offered by the school. J.A. 231-236.[36] Without more, the existence of this noncurriculum related club triggered the nondiscrimination safeguards of the Act.

[35] As Senator Danforth explained the point of his modification:

> I think that the schools have the general authority, and should have the general authority, to try to create an atmosphere which is conducive to the intellectual, physical, psychological development of children, and that the schools have the inherent power to take such actions as are conducive to such development of kids, and in like manner, to try to prevent those activities which are injurious to the mental, emotional, and physical development of children.

130 Cong. Rec. 19,228-19,229 (1984). He and other members of Congress placed special emphasis on the concluding phrase of Section 4071(f), apparently in order to respond to concerns that the "open forum" obligations of schools somehow removed their authority to exclude cults and other coercive groups. See, *e.g.*, *ibid.*; 130 Cong. Rec. 19,224 (1984) (Sen. Hatfield) (authority to prohibit disruptive activities); *id.* at 20,941 (Rep. Goodling) (authority to exclude "hate groups").

[36] Subsequently, Dr. Findley offered that the Peer Advocates program could be related, presumably indirectly, to the sociology and psychology courses offered by the school insofar as it involved a "service" activity. J.A. 233.

Similarly, the chess club, as well as Interact and Zonta, appear to be noncurriculum related clubs. Although petitioners contended that the chess club was related to courses in math, the connection of chess to math—even if math teachers have experimented with encouraging chess playing by their students (see J.A. 442-444)—is attenuated at best. To maintain that any club which teaches "critical thinking" (J.A. 220-221) is thereby related to courses in math converts to that extent the line drawn by Congress into a toothless standard. Indeed, chess clubs were frequently cited in the debates on the Act as precisely the sort of noncurriculum related activity that would trigger the Act's protections. See, *e.g.*, 130 Cong. Rec. 19,216 (1984) (Sen. Denton); *id.* at 19,223 (Sen. Hatfield); *id.* at 19,240 (Sen. Biden); *id.* at 19,242 (Sen. Jepsen).

There is more. Interact is a service organization affiliated with Rotary International; Zonta is a similar organization affiliated with an international women's organization of the same name. Petitioners assert that participation in Interact and Zonta is "curriculum related" because this activity teaches ideals of community service, which are goals of the Social Studies department. However, while Westside students may earn extra credit for a variety of service projects, some of which may be carried out through Interact, "it is certainly not always a one-to-one match." J.A. 302. The service clubs and the Social Studies department exist independently, and the school's literature about the clubs and the Social Studies courses draws no explicit connection between them. See J.A. 299-300; 481, 485.

Despite the foregoing, petitioners maintain that Westside does not fall within the Act because every club at Westside must have a faculty "sponsor," and that the Act's "limited open forum" is inconsistent with such a notion of sponsorship. See 20 U.S.C. 4071(c). Petitioners tie their claim most tightly to the provision in paragraph 2 of Policy 5610 that "[s]chool-sponsored clubs and organizations are those directly under the control of the

school administration, and shall have faculty sponsorship." J.A. 488.

This rationale, however, appears to be more a post hoc justification than a guiding principle. First, the school's effort to read so much into its commitment to "sponsorship" is emphatically denied by the students, who repeatedly testified that many faculty "sponsors" functioned like monitors.[37] Nor is the principle—or the content claimed to accompany it (such as the commitment to present all issues in a neutral manner)—developed in any other school rule or regulation.[38] Third, the school "sponsors" two organizations, Interact and Zonta, that are affiliated with organizations that advocate specific philosophical commitments. See "Interact Sponsorship," Pamphlet of Rotary Int'l, No. 657-EN.[39] Finally, it appears that the only instance in which Westside has denied a request for a club based on the content of the proposed expression is the present case involving religious speech.[40]

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[37] See note 7, *supra*.

[38] The students therefore testified that they believed Westside had an "open forum." See J.A. 118, Tr. 129.

School Policy 5610 itself requires that the school establish "operational guidelines" for the clubs. J.A. 488. The school has never done so, although these would seem the natural place for rules concerning the balanced presentation of material during student activities.

[39] In light of the refrain in their brief that the school "endorses" all its activities, Dr. Findley's effort to distinguish as not endorsed the ideology of the Rotary Club (as opposed to the service projects the Club supports) is strained. J.A. 436-438. Rotary International itself maintains that, as sponsor, it "has control and supervision over all activities, policies, and programs of the Interact Club." "Interact Sponsorship," Pamphlet of Rotary Int'l, No. 657-EN, at 2.

[40] Westside denied two clubs—a soccer team and a girls' softball team—because it did not have the facilities to handle them and because competition in the area was inadequate. J.A. 293-294, 310. It also denied a request for a "Dungeons and Dragons" club, apparently because of student safety concerns. See J.A. 367 (denial because "with the negative kinds of commentary that was out in the newspaper et cetera and some of the things that had happened to youngsters playing it, it didn't seem appropriate"). The school used to have a "Hi-Y" club, which it discontinued because of the

In significant part, petitioners' argument is that, because all clubs at Westside are sponsored, it would be impossible to allow a religious club, because that club would have to be "sponsored" and "endorsed" by the school. See, *e.g.*, Pet. Br. 29, 50-53, 55. Petitioners' argument misses the point, and would render the Act a nullity. A school cannot keep a forum "closed" merely by placing the label "sponsored" on all clubs—except those it does not want to admit—that enter the forum. The fact that a given noncurriculum related club (such as a chess club) may be sponsored does not make it any less "noncurriculum related." A school need not, indeed under the Act cannot, offer a club for religious speech the concomitants of sponsorship. Rather, as the Act clarifies, all the school should offer is equal access to its facilities. See 20 U.S.C. 4071(c). That result would require no "radical restructur[ing]" (Pet. Br. 54) of current practice at Westside.

II. The Equal Access Act promotes the values of the Establishment Clause

A. Both the Equal Access Act and the Establishment Clause protect an open, neutral forum for religious and other expression

The Equal Access Act does not effect or promote "an establishment of religion." U.S. Const. Amend. I. On the contrary, by ensuring that public schools with open forums "effect no favoritism among sects or between religion and nonreligion, and * * * work deterrence of no religious belief," *Abington Sch. Dist.* v. *Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring), the Act serves the values that inform the Establishment Clause. For the Establishment Clause, no less than the Free Speech or Free Exercise Clauses, was included in the Bill of Rights to safeguard liberty. By prohibiting official

association of that club with the YMCA. J.A. 348-349. (Before 1970, the school had allowed a number of political groups to meet, but the arrangement was apparently part of a government class in which care was taken to ensure balanced presentation. J.A. 344-345; Tr. 476-479).

orthodoxy, it promotes "diversity and pluralism in all areas." *Lynch* v. *Donnelly*, 465 U.S. 668, 678 (1984). The two Religion Clauses are thus complementary, not conflicting.[41] Just as the Free Exercise Clause protects the rights of individuals and groups to profess and practice their faith, the Establishment Clause ensures that those rights will not be burdened by being subordinated to a state preference for a particular faith or for no faith.

As this Court has explained, "the Constitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. at 673. The limits of permissible government action under the Establishment Clause "must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." *McDaniel* v. *Paty*, 435 U.S. at 638 (Brennan, J., concurring in the judgment).

Indeed, the origins of the Establishment Clause confirm its intended function of preserving and promoting pluralism and diversity. The principal criticism of early drafts of the Clause by members of the First Congress was that it might be interpreted in a manner "extremely hurtful to the cause of religion." 1 Debates and Proceedings in Congress 758 (J. Gales ed. 1834) (remarks of Rep. Huntington); see also *id.* at 757 (remarks of Rep. Sylvester). The response of James Madison, principal author of the draft Amendment, was that "the object it was intended to prevent" was that "one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.* at 758-759; see also *id.* at 758.

A policy of equal access was thus precisely the ideal envisioned by the Framers. Congress acted to implement such a policy in the Equal Access Act, not only for religious speech but for all speech. Its stated purpose was

[41] See McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1.

"to clarify and confirm the First Amendment rights" of secondary school students. S. Rep. No. 357, *supra*, at 3.[42] The legislative record overwhelmingly reflects that broader aim (see generally, pp. 14-19, *supra*); more fundamentally, the plain language of the statute prohibits discrimination not only on the basis of the religious content of speech but "political, philosophical, or other content" as well. 20 U.S.C. 4071(a). This Court has acknowledged that such an objective to "promot[e] pluralism and diversity" is fully consistent with the dictates of the Establishment Clause. *Committee for Public Educ. & Rel. Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973).[43]

In addition, insofar as a legislature determines that a practice represents "a form of 'hostility' toward religion,

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[42] In the absence of any evidence that undermines the stated legislative intent, that intent must be accorded appropriate deference. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971); see *Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2571 (1988); *Edwards*, 482 U.S. at 586-587.

Amicus Anti-Defamation League suggests (Br. 5) that the Act is an effort to circumvent this Court's school prayer decisions. To the contrary, the Act bears no resemblance to bills that proposed constitutional amendments to allow prayer in the schools. Both chambers of Congress endorsed the Equal Access Act in large numbers—the Senate by a vote of 88 to 11; the House by a vote of 337 to 77. See note 20, *supra*. Senator Hatfield, co-author of the final language of the bill, had opposed a constitutional amendment allowing school prayer. See 130 Cong. Rec. 19,217 (1984) (Sen. Hatfield. Other supporters of the Act, including those who had opposed school prayer amendments, noted the difference between the initiatives. See *id.* at 19,237 (Sen. Bumpers); *id.* at 19,240 (Sen. Biden); see also S. Rep. No. 357, *supra*, at 28-29 (distinguishing between Act's purpose to end suppression of individual speech and cases disallowing school-sponsored prayer).

[43] See also *Walz* v. *Tax Comm'n*, 397 U.S. 664, 672-673 (1970) (legitimate purpose to foster "moral or mental improvement" of community at large by granting tax exemptions to broad range of organizations, including religious ones); *id.* at 689 (Brennan, J., concurring) (legitimate purpose to exempt religious organizations "because they uniquely contribute to the pluralism of American society"); compare *Edwards*, 482 U.S. at 588, 594 (teaching variety of scientific theories, rather than limiting teaching, would have "clear secular intent"); *id.* at 604 (Powell, J., concurring).

'[correction of that practice] constitut[es] a reasonable and balanced attempt to guard against those dangers.'" *Nyquist*, 413 U.S. at 793 (quoting *Walz* v. *Tax Comm'n*, 397 U.S. 664, 673 (1970)). As this Court determined in *Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334 (1987), Congress may take action to guard the "benevolent neutrality" mandated by the Establishment Clause so as to "permit religious exercise to exist without sponsorship and without interference." And Congress, as well as the States, may take such action regarding the public schools. To require otherwise would be to "read into the Bill of Rights * * * a philosophy of hostility to religion." *Zorach* v. *Clauson*, 343 U.S. 306, 315 (1952).[44]

Like the Establishment Clause itself, the Equal Access Act simply safeguards an open forum in which individuals or groups of individuals are free to engage in religious, nonreligious, or irreligious speech, as they see fit. Under the Act, use of a school forum depends on "voluntary" and "student-initiated" action. 20 U.S.C. 4071(c)(1). Meetings may not be sponsored by the school, the government, or agents or employees thereof; school employees can be present only as monitors; nonschool persons cannot direct, conduct, control, or regularly attend the meetings; no governmental body can influence the religious content of meetings, or require any person to participate in them; no public funds can be expended beyond the cost of providing meeting space; and no school agent or employee can be compelled to attend any meet-

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[44] For the same reason, the Equal Access Act in its earlier incarnations had just as constitutionally legitimate a purpose. While religious classifications cannot be used to impose "duties, penalties, privileges or benefits," they surely are permitted to accommodate religious practices, or "to create without state involvement an atmosphere in which voluntary religious exercise may flourish." *McDaniel*, 435 U.S. at 639 (Brennan, J., concurring in the judgment); see also *Edwards*, 482 U.S. at 617-618 (Scalia, J., dissenting).

ing against his or her beliefs. 20 U.S.C. 4071(c)(1)-(3) and (5); 4071(d)(1)-(4).[45]

The opening of a forum in which religious views may (or may not) be expressed by individuals—not by the State—communicates no message, neither one of endorsement nor one of disapproval, that would make religion relevant to status in the political community. *Lynch* v. *Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring); *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. 3086, 3101 (1989). Where benefits offered for secular purposes by a State—here, an open forum—can only accrue to the advantage of religion through the decisions of private individuals, there is little if any danger that the "imprimatur of state approval" will descend. *Mueller* v. *Allen*, 463 U.S. 388, 399 (1983); cf. *Meek* v. *Pittenger*, 421 U.S. 349, 359-362 (1975)

[45] Amici suggest that the danger of sponsorship is increased because secondary students are subject to compulsory attendance laws. Amer. Jewish Comm. Br. 17; Anti-Defam. League Br. 21. However, the Act limits the time "open forums" may occur to "noninstructional time"—that is, "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." 20 U.S.C. 4072(4). The compulsory attendance laws clearly are not implicated by this case because the "forum" at Westside took place after school hours when other students were free to leave. Pet. App. A4; J.A. 60. Cf. *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203, 209-210 (1948) (release time program invalid where students "released in part from their legal duty [to attend school] upon the condition that they attend religious classes").

Amicus Anti-Defamation League also notes (Br. 27) that students could go elsewhere for their religious meetings (an argument that somewhat undermines the force of their "compulsory attendance" claim). See also Pet. Br. 53 n.22. The short answer to this is that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Grayned* v. *City of Rockford*, 408 U.S. 104, 118 n.40 (1972) (quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939)); see also *Healy* v. *James*, 408 U.S. 169, 183 (1972) (group's possible ability to exist outside campus does not significantly ameliorate disabilities posed by denial of access to campus facilities); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975). The record indicates, in any event (see, *e.g.*, J.A. 165-166; Tr. 127, 136), that some students could not attend meetings in other places.

(Stewart, J.); *Board of Educ.* v. *Allen*, 392 U.S. 236, 243-244 (1968); *Walz*, 397 U.S. at 696 (Harlan, J.); *Aguilar* v. *Felton*, 473 U.S. 402, 417-419 (1985) (Powell, J., concurring).[46]

When a school establishes an open forum, it sends its students a signal that there *is* a political community—of which they are the members. Access to a school's open forum, no less than to a school's library, "prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." *Pico*, 457 U.S. at 868 (plurality opinion). Access or its denial, like the freedom or lack of freedom to express opinions outside the classroom, importantly affects the educational process. See *Tinker* v. *Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 511-512 (1969).

Consequently, once a forum is "opened," equal access to it is necessary to confirm that no point of view is disfavored nor any member denigrated. Any contrary message is as impermissible if sent by the State in its role as educator as it is if sent by the State in any other role. See *Widmar*, *supra* (forum for college students); *Madison Joint Sch. Dist.* v. *Wisconsin Emp. Rel'ns Comm'n*, 429 U.S. 167 (1976) (forum for citizen involvement).[47] In short, "government may not as a goal promote 'safe thinking' with respect to religion [by] * * * fenc[ing] out from political participation" all those it regards as "overinvolved in religion." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment).

Nor are there any unconstitutional consequences that accompany recognizing the right to religious speech in a school's open forum.

[46] As the Court concluded in a similar case (*Mueller*, 463 U.S. at 400):

> The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefits at issue in this case.

[47] See also *Healy*, 408 U.S. at 180-181.

1. Religious groups receive only those "benefits" which accrue equally to all groups using the forum. Those benefits are truly "incidental"—both in the sense that they reach religious groups only as part of a "broad spectrum" of actual or potential recipients, and in the sense that they impose insignificant costs on the State (use of a classroom, the electricity to heat and light it, and perhaps the time of a school monitor). *Mueller*, 463 U.S. at 399. As this Court has repeatedly ruled, a religious group's "enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." *Widmar*, 454 U.S. at 273.[48]

2. There is, thus, no danger that allowing religious speech will be mistaken for sponsoring it: the very nature of a forum open to student use negates the possibility that a club will receive some "unique and exclusive benefit" of public recognition, approval or prestige. *Lynch*, 465 U.S. at 701 (Brennan, J., dissenting). Rather, as this Court made clear in *Widmar*, students are capable of understanding that a public school does not confer an "imprimatur" of state approval on every student group when it allows all members of the student community to use its facilities on equal terms. The same logic—that the "setting" in which religious expression occurs determines whether it is accompanied by a message of endorsement by the State—allows parishioners to sing carols in a public park (see *County of Allegheny*, 109

[48] See, *e.g.*, *Widmar* (general access to forum); *Kendrick*, 108 S. Ct. at 2571 (wide eligibility to receive funding); *Mueller*, 463 U.S. at 397 (tax deduction for actual educational expenses available to all parents); *Roemer* v. *Maryland Bd. of Public Works*, 426 U.S. 736, 746 (1976) (Blackmun, J.) (subsidies to all qualifying colleges and universities); *Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971) (same, as far as construction grants); *Walz*, 397 U.S. at 671-673 (tax exemption to nonprofit organizations); *Board of Educ.* v. *Allen*, 392 U.S. 236, 243 (1968) (provision of secular schoolbooks to all students); *Everson v. Board of Educ.*, 330 U.S. 1, 16-18 (1947) (general program to pay pupils' transportation expenses, including reimbursement to parochial school children); cf. *Lynch*, 465 U.S. at 683 (dilute benefit to religion from displays of religious paintings and similar practices).

S. Ct. at 3111) and cities to put up holiday displays that contain religious elements (see *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). Likewise, while allowing certain speech in a nonpublic forum may carry the danger that an appearance of "favoritism" will be created (*Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion)), allowing that speech in an open forum carries no such danger (*id.* at 321 (Brennan, J., dissenting)).[49]

The situations in which this Court has invalidated government practices because they appeared to sponsor religion are vastly different. There is created in those cases a "crucial symbolic link" (*Bowen* v. *Kendrick*, 108 S. Ct. 2562, 2576 (1988)) between state and religion that the Establishment Clause has been deemed to prohibit. Compare *Grand Rapids Sch. Dist.* v. *Ball*, 473 U.S. 373, 389-392 (1985) ("symbolic union" between church and state where students move back and forth between religious and "public school" classes in the same private school building, and public school teachers may appear to be "regular adjunct[s]" to the religious school); *Abington Sch. Dist.*, *supra* (Bible readings part of prescribed curriculum, conducted under supervision of teachers, children may be excused from classroom during readings); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (state-drafted school prayer); *Illinois ex rel. McCollum* v. *Board of Educ.*, 333 U.S. 203 (1948) ("release time" program for religious instruction on public school grounds, nonparticipating students kept at school for secular work).[50]

[49] In any case, a disclaimer by a school of endorsement should resolve any problem that might arise. See *Widmar*, 454 U.S. at 274 n.14; see also *County of Allegheny*, 109 S. Ct. at 3115 (Blackmun, J.). Just as a school can clearly identify the use of religious materials for objective study in the classroom (see *Abingdon Sch. Dist.*, 374 U.S. at 225), it can clearly identify the presence of religious expression as part of the pluralism of an open forum.

[50] The presence of teachers as "monitors" does not affect the analysis. Secondary school students, like adults, are used to the presence of police in public places. They recognize the disciplining role of teachers in many areas of school life. Conversely, teachers are statutorily mandated to act neutrally (see 20 U.S.C. 4071(c)(2)

3. Nor does the fact that the Act refers to forums in secondary schools provide any basis for distinguishing the result in this case from the result in *Widmar*. Amici for petitioner[51] argue that secondary school students are fatally impressionable. In amici's pessimistic view, high school students are to be stripped of basic constitutional rights enjoyed by college students because they are incapable of understanding that speech in a school forum—no matter how like a university forum in other ways—is not speech endorsed or sponsored by the State. This is both fanciful and pernicious. In the first instance, amici's argument equates to one that the government should enforce a content-based regulation of student speech. This censorious approach strikes at the heart of constitutionally protected liberties. As when government initiates such a regulation, the party raising the argument must bear a heavy burden of persuasion. In this case, petitioners do not even attempt to carry that burden (Pet. Br. 89-91); for their part, amici have not come close to adducing the type of evidence that would justify the regime which they seek to impose on the American educational system.

The facts in this case severely undermine the amici's argument. The district court specifically found that the format of an open forum would, in the case of Westside High School, sufficiently protect against the danger that allowing access would appear to confer the school's imprimatur. Pet. App. B11 n.1. Further, the court cred-

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and (3)), and there is no indication that it is difficult to "monitor" students in a neutral manner.

Nor indeed is there any "magic," as Professor Laycock has aptly put it, that changes the constitutional question when it involves a public school location. Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 9 (1986). Presence on government property of any type is simply one of many factors to be taken into account in weighing the danger of sponsorship. See, *e.g.*, *Widmar*, 454 U.S. at 274; *County of Allegheny*, 109 S. Ct. at 3111; compare *McCollum*, 333 U.S. at 231 (Frankfurter, J.) (noting that other "release time" programs that differ in some detail may be upheld).

[51] See Amer. Jewish Comm. Br. 13-14, 15-21; Anti-Defam. League Br. 22-23.

ited the testimony of respondents' expert on child development, who testified that students over the age of 12 could recognize the difference between endorsement and its lack. *Ibid.* That testimony comports entirely with common sense and the judgment of Congress.

Indeed, the proposition that the government "does not endorse everything it fails to censor"[52] is not a complicated one. The Act assumes understanding of that concept by no student below the secondary school level "as determined by State law." 20 U.S.C. 4072(1). The Act thus has within its purview those students whom the States themselves have concluded are sufficiently mature to handle more advanced concepts. Surely at that level of understanding, a student can readily recognize that not all uncensored speech is thereby sponsored speech (especially if the State is not "allowed" by the Constitution to censor it).[53] In any event, if the concept is somehow not immediately apparent to secondary school students, it certainly can be explained to them. In fact, given the bedrock importance of the principle that free speech is speech unsponsored by the State, it would seem essential that a high school civics education clarify the proposition. See *Bethel Sch. Dist.* v. *Fraser*, 478 U.S. 675, 681 (1986); *West Virginia Board of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943). Here, as elsewhere, the most effective teaching is not by precept, but by example.

More importantly, Congress carefully considered and made extensive findings concerning the capacity of students to distinguish free speech from state-sponsored speech. After hearing extensive testimony from students and administrators (see note 16, *supra*) and considering the conclusions of scholars (see S. Rep. No. 357, *supra*, at 8; H.R. Rep. No. 710, *supra*, at 4) and psychologists

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[52] Laycock, *supra* note 50, at 15.

[53] As the Court noted in responding to the claim that the bestowal of tax exemptions on religious organizations created a danger of sponsorship: "No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees 'on the public payroll.'" *Walz*, 397 U.S. at 675.

(see S. Rep. No. 357, *supra*, at 35), the Senate Committee on the Judiciary expressly found:

> [S]tudents below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other.

Ibid.; see also *id.* at 8-10.

In addition, the Committee concluded that current suppression of religious expression in the schools when other student activities were permitted had led "students reasonably [to] perceive the denial of access for religious speech as State hostility toward religion." S. Rep. No. 357, *supra*, at 36; see also *id.* at 10-11, 12, 19.[54] In its report, the House Committee on Education and Labor came to the same conclusions about public education's perceived hostility to religion. See H.R. Rep. No. 710, *supra*, at 3-6.

On the floor, members of Congress—from both sides of the aisle—strongly affirmed their agreement with the Committees' findings.[55] Moreover, they enacted final language from which coverage for elementary schools had been deleted, and which placed the determination of which students should be considered within secondary schools in the hands of the States.[56]

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[54] The Committee in turn registered its concern that the "tragic perception [held by students] that the government is affirmatively hostile to religious expression * * * could * * * lead to the national disaster of intolerance of religion." S. Rep. No. 357, *supra*, at 21.

[55] See, *e.g.*, 130 Cong. Rec. 19,218 (1984) (Sen. Dixon) (high school students "sufficiently sophisticated" to understand equal access); *id.* at 19,238-19,239 (Sen. Durenburger) ("as many experts acknowledge and as the young students who testified showed, students below the college age can understand that an equal access policy is one of State neutrality"); *id.* at 20,936 (discussing studies of adolescent psychology); see also, *e.g.*, *id.* at 20,933 (Rep. Frank); *id.* at 15,004 (Sen. Denton) (noting reasonable perception of hostility); *id.* at 19,216 (Sen. Denton) (same); *id.* at 19,221 (Sen. Leahy) (same).

[56] Compare 20 U.S.C. 4071(a) and 4072(1) with Equal Access Act, as introduced Feb. 22, 1984, Section 2(a) and Section 6(4), S. Rep. No. 357, *supra*, at 1-3. Congress had investigated during the hearings the possibility that coverage under the Act for elementary school children could raise graver problems because, for example, of their limited ability to initiate activities. See, *e.g.*, *Hearings on S. 815 and S. 1059*, *supra*, at 14-15 (Sen. Hatfield); *id.* at 228, 246-247, 256, 271 (organizational representatives); *Hearings on H.R. 2732*, *supra*, at 46-47, 235 (same); *id.* at 220 (Rep. Bonker); *Hearing on H.R. 4996*, *supra*, at 79, 100, 105 (organizational representatives).

Congress's conclusion, then, is far from one that is "unthinking," reflexive, or unconsidered. To the contrary, it is the deliberate conclusion of a representative body well-suited to evaluating and resolving factual issues. In our democratic system, that conclusion is entitled to deference from the Article III branch with its inherent institutional limitations. *Rostker* v. *Goldberg*, 453 U.S. 57, 72-74 (1981); *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966). Deference is especially warranted here, because Congress specifically considered the constitutionality of equal access for students younger than those of college age. See *Rostker*, 453 U.S. at 64. See, *e.g.*, note 56, *supra*; S. Rep. No. 357, *supra*, at 6-9, 23, 35-36; H.R. Rep. No. 710, *supra*, at 3-4; see generally S. Rep. No. 357, *supra*, at 21-36.

In so concluding, Congress broke no new ground. This Court has repeatedly assumed, perhaps because of the dangers of assuming the opposite, that students have the requisite maturity to understand bedrock rights of free speech. See *Tinker*, *supra*; *Barnette*, *supra*; cf. *Pico*, *supra*. Although the Court has recognized that students below college age may be less able to distinguish government endorsement of religion from nonendorsement (see, *e.g.*, *Grand Rapids*, 473 U.S. at 383), the Court has never suppressed student free speech in order to clarify the difference. To the contrary, its "sponsorship" decisions have restrained *state* actions encouraging religious belief.[57] And, those decisions have all involved ele-

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[57] See, *e.g.*, *Grand Rapids*, *supra* (teaching by public school employees on parochial school grounds created appearance of connection between state and religion); *Abington Sch. Dist.*, *supra* (re-

mentary school, as well as secondary school, students.[58] The challenge to the constitutionality of the Act as applied at Westside High School can involve only students in grades 9 and above.[59]

A conclusion contrary to that reached by Congress and indicated by the previous decisions of this Court would be both remarkable and sobering. If students cannot understand that a State does not endorse everything it does not censor, they likewise will not understand that principle's corollary. They will perceive that what a State does censor—here religious speech—it must disapprove. In fact, the latter message—that the State is hostile to religion—would seem to be especially probable: while censorship typically does convey disapproval in American society, our First Amendment tradition generally explains the reasons for tolerance in "open forums." See p. 40, *supra* (describing congressional findings that students reasonably perceive State hostility towards religion); cf. *Wallace* v. *Jaffree*, 472 U.S. 38, 83 (1985) (O'Connor, J., concurring in the judgment) (noting that evaluation of message sent by government action must assume receiving individual's knowledge of First Amendment principle of free exercise). Exclusion of religion, and the message it conveys, would itself contravene the Establishment Clause, by sending the clear message that the State favors irreligion.

Experience has demonstrated that rigid application of formulaic tests cannot satisfactorily resolve the deli-

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quired prayer); *Engel* v. *Vitale*, 370 U.S. 421 (1962) (same); *McCollum*, *supra* (release time program); cf. *Stone* v. *Graham*, 449 U.S. 39 (1980) (posting of Ten Commandments, no possible "secular purpose").

[58] See *Grand Rapids*, 473 U.S. at 376 n.1; *Abington Sch. Dist.*, 374 U.S. at 205, 211 & n.4; *Engel*, 370 U.S. at 422; *McCollum*, 333 U.S. at 207-208; cf. *Stone* v. *Graham*, 449 U.S. 39, 39 & n.1 (1980).

[59] Under Nebraska law, "elementary school" includes grades 1-8; "high school" includes grades 9-12. Neb. Rev. Stat. § 79-101(4) and (5) (1987). At the time this suit was filed, Westside included grades 10 through 12. As of 1987-1988, 9th graders apparently enrolled at Westside. Tr. 602.

cate issues raised by the Establishment Clause. Thus, as Congress specifically concluded, it was the application of mechanical Establishment Clause jurisprudence in the lower courts that misled school boards to suppress free religious speech. And, this Court has departed from adherence to the tripartite test articulated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), when its rigid application may well have led to a result plainly at odds with the intentions of the Framers. See *Marsh* v. *Chambers*, 463 U.S. 783 (1983) (declining to apply *Lemon* test to issue of constitutionality of state legislative chaplaincy). In addition, the *Lemon* test has generated results that often obfuscate as much as they illuminate proper action under the Establishment Clause.[60] Especially when the *Lemon* test is divorced from the context in which it was spawned—financial aid to highly sectarian institutions—it sweeps within its breadth a whole range of practices and traditions with ancient roots in the history and experience of the American people. Nevertheless, because the Equal Access Act so directly serves the same open forum goal as the Establishment Clause itself, it is hardly surprising that the Act clearly withstands scrutiny even under *Lemon*.[61]

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[60] Compare *Meek*, 421 U.S. at 367-371 (state employees may not provide remedial and accelerated instruction, guidance counseling and testing, speech and hearing services in nonpublic schools), with *Wolman* v. *Walter*, 433 U.S. 229, 241-248 (1977) (state employees may provide speech and hearing diagnostic testing (where these provisions of statute severable) within sectarian school; guidance, remedial, and therapeutic services may be provided in mobile unit off site of religious school). Commentators have likewise noted the confusion. See Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 17-20 (1979); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266, 268-270 (1987).

[61] The Act plainly has a "secular legislative purpose." *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971). As described previously, the Act was intended to and expressly does protect speech from discrimination on the basis not only of religious but "political, philosophical, or other content" as well. See pp. 16, 19, 31-32, *supra*. The Act does not have the principal or primary effect of promoting

B. Congress's decision to require equal access to an open forum when a school permits one or more noncurricular student groups to meet does not establish religion

The decision of Congress to trigger the non-discrimination safeguards of the Equal Access Act whenever a secondary school (1) receives federal funds and (2) affords an opportunity for "one or more noncurriculum related student groups to meet" (20 U.S.C. 4071(b)) does not alter the foregoing analysis. This Court's decisions make clear that a limited open forum for purposes of constitutional analysis can be established "'by policy

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religion (*Lemon*, 403 U.S. at 612) for the reasons more fully developed above (see pp. 32-42, *supra*). Individuals engaged in religious speech receive only the "incidental benefits" bestowed on a wide range of speakers. In addition, there is no appearance of sponsorship because the Act clearly safeguards a neutral forum in which individuals or groups are free to speak as individuals, not as groups affiliated with the State.

Finally, the Act does not pose any danger of excessive entanglement between the state and religion. *Lemon*, 403 U.S. at 613. The only relationship created by the Act is one of oversight. School employees may attend student meetings only to monitor them for orderliness and compliance with school regulations and Act requirements. See 20 U.S.C. 4071(c)(3) and 4071(f). Such involvement is like that provided by police and fire departments to many religious groups, both in their activities on public property and for their security on private property (see *Widmar*, 454 U.S. at 274-275); it does not approach the "comprehensive, discriminating, and continuing state surveillance" that this Court has found excessively to entangle Church and State. *Lemon*, 403 U.S. at 619. See, *e.g.*, *ibid.* (state funding of parochial school employees to teach secular subjects without religious influence); *Aguilar*, *supra* (state administration of federal funds to pay public employees to provide secular services in parochial schools); *Meek*, *supra* (guidance, testing, and other services offered by public employees on parochial school grounds).

Indeed, as the Court noted in *Widmar*, a school risks greater entanglement in attempting to distinguish and exclude religious speech from an open forum than it does in neutrally allowing free speech by students. 454 U.S. at 272 n.11. The Act thus reduces existing and potential entanglement by ensuring that school officials not engage in selection and apparent endorsement of *some* religious speech.

or by practice.'" *Hazelwood*, 484 U.S. at 270 (emphasis added) (quoting *Perry Educ. Ass'n*, 460 U.S. at 47). See also *Perry*, 460 U.S. at 45 (public forum can be created "by long tradition or by government fiat"). The effect of the Act is to require secondary schools, as a condition of acceptance of federal financial assistance, to acknowledge a limited open forum as their policy if they permit one or more noncurriculum groups to meet. Under *Widmar* and this Court's other precedents, a school with such a policy does not violate the Establishment Clause if it accords religious groups equal access.

Much of the argument of petitioners and their amici is devoted to attempting to establish that Westside in fact did not have a limited public forum under the criteria set forth by this Court in *Widmar* and *Perry*.[62] The argument is unavailing. Given the wide range of student-initiated clubs at Westside, the court of appeals correctly concluded that "[t]he facts in *Widmar* are quite similar to the facts in the instant case." Pet. App. A15.

More fundamentally, however, a determination of whether Westside established a limited public forum in the constitutional sense on the basis of its previous actions or published statements is beside the point. As explained above, Westside afforded an "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. 4071(b). As a condition of Westside's acceptance of federal funds, therefore, the Act requires Westside to adopt a limited open forum "by policy," complete with equal access.

There can be no serious doubt that a limited open forum can be established as a matter of policy, quite apart from any consideration of actual practice. Any other rule would, for example, mean that a newly opened school could not have a limited open forum, because there would have been no practice at the school. The Equal Access Act simply requires that such a policy be adopted at

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[62] Petitioners state that "[s]ince no constitutional limited public forum exists at WHS, none should exist for purposes of the Act either." Pet. Br. 60 n.24.

secondary schools meeting the prerequisites of the Act. Given such a policy, *Widmar* makes clear that the requirements of equal access and non-discrimination in the Act do not contravene the Establishment Clause and, indeed, are mandated by the Free Speech Clause.

We recognize that application of the plain language of the Act may, in particular cases, result in the imposition of equal access and non-discrimination requirements at secondary schools that did not previously have a limited public forum in the constitutional sense. But the practice that develops as a result of application of the Act and this policy will depend entirely on the desires and actions of the students. What is clear is that there will be at least one other noncurriculum related club—the trigger in the Act. Whether the students establish ten, twenty, or one hundred others will be independent of the school, as will any decision to establish any club to engage in speech on religious subjects. See *Mueller*, 463 U.S. at 399 (upholding tax deduction for school expenses, including parochial school expenses, because "[w]here * * * aid to parochial schools is available only as a result of decisions of individual parents, no 'imprimatur of state approval,' *Widmar*, *supra*, at 274, can be deemed to have been conferred on any particular religion, or on religion generally").

In *Widmar*, the Court concluded that the open forum at issue in that case would not have the primary effect of advancing religion, "[a]t least in the absence of empirical evidence that religious groups will dominate [the] open forum." 454 U.S. at 275. Later, however, in *Mueller*, the Court questioned the utility of any such empirical evidence, stating that "[w]e would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." 463 U.S. at 401. Here, in any event, the challenge is to the statute as applied. There are already a number of other, noncurriculum related clubs at Westside. There is no indication that a religious club will so dominate the forum that students will not be able

to recognize that the club is not endorsed by the school. To the contrary, the district court found that "[u]nder the facts of this case, * * * the proposed format protects against the conferring of an imprimatur of school approval." Pet. App. B11 n.1.

C. The Establishment Clause does not operate to suppress the activity of private individuals

At bottom, petitioners' complaint is in large part a complaint about the actions of individual students. We agree that there is a powerful element in peer pressure. It is coercive; but it is not the coercion of the State. It is, in fact, the coercion that occurs among participants in "the pluralistic, often contentious society in which they will soon be adult members." That in no small part is the natural result of liberty—liberty to think, to speak, to debate and to persuade.

The Establishment Clause, however, operates only against the State. It "mean[s] that the *government* may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs." *County of Allegheny*, 109 S. Ct. at 3099 (footnotes omitted; emphasis added). It focuses on the message the *government* sends. *Id.* at 3101. "The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion." *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment). It may not be used, however, "as a sword to justify repression of religion or its adherents from any aspects of public life." *Ibid.*

The First Amendment requires that actions establishing religion by the State, which are prohibited by the Establishment Clause, be distinguished from religious expression and participation by individuals, which are protected by the Free Speech and Free Exercise Clauses. *Bender* v. *Williamsport Area Sch. Dist.*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting). A public forum,

once created, becomes a place for individual expression—a basic human liberty. The Establishment Clause cannot be used to police it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

The Equal Access Act, 20 U.S.C. 4071 *et seq.* (Supp. V. 1987), provides as follows:

§ 4071. Denial of equal access prohibited

(a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) "Limited open forum" defined

A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Fair opportunity criteria

Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Construction of subchapter with respect to certain rights

Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Federal financial assistance to schools unaffected

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this subchapter shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Authority of schools with respect to order, discipline, well-being, and attendance concerns

Nothing in this subchapter shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

§ 4072. Definitions

As used in this subchapter—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

§ 4073. Severability

If any provision of this subchapter or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the subchapter and the application to other persons or circumstances shall not be affected thereby.

§ 4074. Construction

The provisions of this subchapter shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

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FOR ARGUMENT

No. 88-1597

Supreme Court, U.S.
FILED
DEC 4 1989
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CLERK

12/7 Motion Pending

IN THE

Supreme Court of the United States

October Term, 1989

The Board of Education of the Westside Community Schools (Dist. 66); Wayne W. Meier, President of the Westside Community School Board; James E. Findley, Principal of the Westside High School; James A. Tangdall, Assistant Superintendent of the Westside Community School District; and Kenneth K. Hansen, Superintendent of the Westside Community School District,

Petitioners,

Bridget C. Mergens, by and through her next friend, Dr. Daniel N. Mergens; Stephen P. Hollar, by and through his next friend, Mrs. Judith L. Hollar; Brian P. Rensing, by and through his next friends, Robert W. and Sherry K. Rensing; David K. Harris, by and through his next friends, Kenneth and Myra Harris; and Andrea Simmons, by and through her next friends, Robert L. and Linda L. Simmons,

Respondents,

United States of America,

Respondent,

Kendra K. Kellison, etc. by and through her next of friends, Victor Kraatz and Linda Kraatz; Michelle M. Harris, etc. by and through her next of friends, Kenneth Harris and Myra Harris; and Kevin Brown, etc. by and through his next of friends, Robert W. Rensing and Sherry K. Rensing; Matt Schulz; Ingrid Kimmons; Jason Brone; Jennifer Waggoner; and Allison Wells,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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34

TABLE OF CONTENTS

Table of Contents i

Table of Authorities iii

Summary of Argument 1

Argument 6

I. RESPONDENTS' ARGUMENTS CANNOT BE SQUARED WITH THE RECORD 6

A. WHS Has Not Singled Out Religious Clubs For Adverse Treatment 7

B. WHS' Clubs Are All Curriculum Related 9

1. Interact And Zonta Were Not Proved To Be Controlled By Non-School Groups 10

2. Peer Advocates Does Not Trigger The Act 14

D. Sponsors Exercised Substantial Authority Over All Clubs 17

II. THE STUDENTS' CONSTITUTIONAL CLAIMS ARE WITHOUT MERIT . . 20

A. *Tinker* and *Healy* Do Not Control This Case 20

B. WHS' Rules Are Not Unconstitutionally Vague . . 21

TABLE OF CONTENTS (Cont'd)

III. THE UNITED STATES' INTERPRETATION OF THE ACT PROMOTES UNCERTAINTY . . 23

A. The Act Leaves The Definition Of Curriculum To School Officials . . . 24

1. Curriculum Should Not Be Defined By Reference To Popular Dictionaries . . . 24

2. The Direct Relationship Between Course and Club Is Not To Be Rigidly Defined 29

3. WHS' Definition of Curriculum Would Not Eviscerate The Act 33

B. The Act Should Be Interpreted In Tandem With Widmar v. Vincent 37

IV. THE STUDENTS SEEK SCHOOL ENDORSEMENT OF THEIR RELIGIOUS ENDEAVOR 42

CONCLUSION 43

Table of Authorities

Cases

Allegheny County v. ACLU,
109 S.Ct. 3086 (1989) . . . 40

Bell v. Little Axe Independent School District,
766 F.2d 1391,
(10th Cir. 1985). 21

Bender v. Williamsport Area School District,
563 F.Supp. 697
(M.D. Pa. 1983),
rev'd, 741 F.2d 538
(3d. Cir. 1984),
rev'd on other grounds,
475 U.S. 534 (1986). . . . 21

Bender v. Williamsport Area School District,
475 U.S. 534 (1986). . . . 41

Board of Educ., Island Trees Union Free School Dist. v. Pico,
457 U.S. 853 (1983) . . . 22

Board of Educ. v. Rowley,
458 U.S. 176 (1982) . . . 16

Bowen v. Kendrick,
108 S.Ct. 2562 (1988) . . . 40

Brandon v. Board of Education, 635 F.2d 971 (2d. Cir. 1980), cert. denied, 454 U.S. 1123, (1981) 20

Engel v. Vitale, 370 U.S. 421 (1962). . . . 12

Grayned v. City of Rockford, 408 U.S. 104 (1972) . . . 22

Hazelwood School District v. Kuhlmeier, 108 S.Ct. 562 (1988) . . . 21, 22, 26, 41

Healy v. James, 408 U.S. 169 (1972). . . . 20, 21

Hernandez v. C.I.R., 109 S.Ct. 2136 (1989) . . . 41

Honig v. Doe, 108 S.Ct. 592 (1988) . . . 16

Monahan v. School Dist., 229 Neb. 139, 425 N.W. 2d 624 (1988) 16

Mueller v. Allen, 436 U.S. 388 (1983). . . . 40

New Haven Inclusion Cases,
399 U.S. 392 (1970) . . . 12

Perry Educational Association
v. Perry Local Educators
Association,
460 U.S. 37 (1983) 19

Tinker v. Des Moines
Independent School Dist.,
393 U.S. 503 (1969). . . . 20, 21

Widmar v. Vincent,
454 U.S. 263 (1981) .. . . passim

Witters v. Washington Dept.
of Services for the Blind,
474 U.S. 481 (1986) . . . 12

CONSTITUTIONS AND STATUTES

Equal Access Act,
20 U.S.C. §4071(a) 43

20 U.S.C. §4071(b) 20

20 U.S.C. §4071(c) 14, 35
43

20 U.S.C. §4072 . . . . . 24, 30

Neb. Rev. Stat. §79,3317 . . 16

Education of All Handicapped Children Act, 20 U.S.C. §1412(5) 16

LEGISLATIVE HISTORY

130 Cong. Rec. 19,218 15

130 Cong. Rec. 19,223 . . . 15, 27, 30, 39

130 Cong. Rec. 19,224 . . . 15

130 Cong. Rec. 19,236 . . . 15, 39

130 Cong. Rec. 19,237 . . . 39

130 Cong. Rec. 19,238 . . . 39

130 Cong. Rec. 19,239 . . . 15, 39

130 Cong. Rec. 19,242 . . . 25, 39

130 Cong. Rec. 19,243 . . . 15, 39

130 Cong. Rec. 20,935 . . . 39

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130 Cong. Rec. 20,942 . . . 27, 30

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B.F. Brown, *New Directions for the Comprehensive High School* (1972) 36

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Commission on the Reorganization of Secondary Education, *Seven Cardinal Principles of Secondary Education*, (1918) 28

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SUMMARY OF ARGUMENT

This case requires the Court to interpret the Equal Access Act. That task is difficult enough without the additional burden of Respondents' misrepresentations of the factual record.

1. WHS refuses to incorporate any ideological groups into its club program. Respondents' claim that WHS singles out religious speech for adverse treatment has no basis in the record.

2(a). Respondents single out Interact, Zonta, and Peer Advocates as clubs which trigger the Act. Their brief introduces new evidence about Interact and Zonta -- evidence which we are denied the opportunity to challenge -- but this evidence proves little. Thus, although both cite Rotary International's claim that it controls Interact groups as proving that Interact at WHS is noncurriculum related, neither proves

that WHS' Interact was in fact controlled by Rotary, not by WHS, or that Rotary's goals are noncurriculum related.

(b). Peer Advocates, designed to facilitate integration of handicapped students, was not student-initiated [20 U.S.C. §4071(c)(1)] and serves the educational functions of assisting mainstreamed handicapped students and helping other students overcome prejudices about the handicapped.

3. Sponsors give students substantial latitude in running clubs. Contrary to Respondents' suggestion, sponsors nevertheless play a significant role in the operation of the club program, ensuring that clubs provide balance and adhere to WHS' goals and mission. Their absence from the Bible Club (and, therefore, under the Act's nondiscrimination principle, from other noncurriculum

related clubs) would transform WHS' club program.

4. Tinker v. Des Moines Ind. School Dist. and Healy v. James are not dispositive because: (1) Hazelwood School Dist. v. Kuhlmeier teaches that Tinker does not apply to school sponsored speech, or speech which might be mistaken for school sponsored; and (2) unlike Healy, this is not a viewpoint discrimination case.

5. WHS' rules are as specific as rules about "curriculum" can be, given the disagreement as to the meaning of that term. Also, this Court has held that specific written rules are unnecessary as a predicate for curriculum decisions.

6. Respondents, citing popular dictionary definitions, insist on a federal definition of curriculum, cast in terms of academic requirements for graduation. Their definition of

noncurriculum relatedness are so broad that they encompass activities such as school newspapers or athletics, which, even Respondents concede, do not trigger the Act.

Educators do not share a common understanding of "curriculum." Interpreting the Act's references to curriculum to permit local school districts substantial leeway in defining this term reflects this lack of consensus, and is consistent with Congressional intent.

7. The United States insists that curriculum related clubs have a "one-to-one" relationship with a specific course. This position makes sections of the legislative history self-contradictory and limits school officials to a narrow, traditional view of education.

8. Although both Respondents assert that leaving the definition of curriculum

to school officials will undermine the Act, both fail to prove that charge and both are forced to create ad hoc categories of clubs which are arbitrarily exempted from triggering the Act.

9. Although the United States contends that the Act departs from the standards enunciated in Widmar for determining the existence of a public forum, the legislative history does not sustain that view. The United States' inistence that even one non-curriculum related club triggers the Act forces a constitutional question reserved in Widmar -- whether a forum dominated by a religious group would establish religion. Congress, which modelled the Act on Widmar, could not have intended to depart from it in this way.

10. The United States advises WHS to dispense with official sponsorship only for the Christian Bible Club in order to

avoid Establishment Clause concerns. This suggestion is at war with the plainest command of the Act -- nondiscrimination between all noncurriculum related clubs.

ARGUMENT

I

RESPONDENTS' ARGUMENTS CANNOT BE SQUARED WITH THE RECORD

To portray this case as a clone of Widmar v. Vincent, 454 U.S. 263 (1981), Respondents[1] systematically ignore the District Court's factual findings -- findings to which the students make not a single reference. This case, however, should be decided on the basis of its record, particularly the District Court's

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[1] We refer to the individual Respondents as "students". Citations to the Court of Appeals' opinion are to App. Pet. A.___, and to that of the District Court to App. Pet. B.___ .

unreversed findings of fact, not the record as Respondents wish it to be.

A. WHS Has Not Singled Out Religious Clubs For Adverse Treatment

Respondents portray Westside High School ("WHS") as enforcing a rule aimed exclusively at religious clubs. This portrayal forms the foundation for much passionate argument about constitutional protection for religious speech., [Students' Brief at 22-25; U.S. Brief at 41-42, 47]. Much as they might try, Respondents cannot make out this case because WHS has not singled out religious speech for adverse treatment.

WHS' club policy, [Policy 5610, J.A. 488], refuses recognition to any club whose purpose is one-sided advancement of ideological views, whether religious or political[2]. [J.A. 257-58; 313-14]. A religious club fares no differently than

[2] Amici Burr suggests [Brief at 23, n. 35] that Future Business Leaders of America [FBLA] advocates support for the

any other ideological club.

The students are quite simply wrong in insisting [Brief at 5] that school officials would permit informal meetings of unrecognized secular clubs, but not of religious ones. School officials testified that no non-approved clubs could meet on a regular basis. [JA 452-53]. The District Court found [Pet. App. B. 24-26] that the rule was uniformly enforced pursuant to a longstanding, uniformly understood and applied set of unwritten procedures.

The proposed Christian Bible Club was the only ideological club denied recognition only because it was the only ideological club which sought recognition. Indeed, ideological clubs

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free enterprise system. FBLA teaches students to succeed in business. [J.A. 447-448]. That is no more ideological advocacy than teaching spelling would be a rejection of George Bernard Shaw's views on English orthography.

existing in the past were either disbanded or transformed in keeping with school rules.[3] [J.A. 344-345 (Young Republicans/Democrats); 348-349 (Hi-Y); Tr. 476-479]. On these facts, a reasonable student could not reasonably believe that WHS was "affirmatively hostile to religious expression." [U.S. Brief at 16, quoting S.Rep. 357, 98th Cong. 2nd Sess. (1984); Students' Brief at 45].

B. WHS' Clubs Are All Curriculum Related

The District Court credited the school officials' testimony that each club at WHS was curriculum related. App.

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[3] As described in our Opening Brief [pp. 10-11], other proposed clubs were turned down for a variety of reasons, including the "inappropriateness" of one, Dungeons and Dragons. The students attempt to dismiss this denial as solely related to safety concerns [Brief at 5], but, although Dr. Findley's testimony mentioned safety, he explained that the club was turned down because of its general "inappropriateness." [J.A. 367].

Pet. B. 22-23,[4]. Respondents challenge the factual correctness of this finding as to three clubs: Interact, Zonta and Chess. They also argue that Peer Advocates, a club not specifically designated in the pre-trial stipulation as "noncurriculum" related [J.A. 60, ¶17], triggered the Act. [Students' Brief at 27; U.S. Brief at 27].

1. Interact and Zonta Were Not Proved to be Controlled by Non-School Groups

Having failed to persuade the trier of fact that Zonta and Interact were not curriculum related,[5] both Respondents try again in this Court. Both go outside

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[4] The Court of Appeals' rejection of this finding [Pet. App. A 12-14] was not based on a rejection of its factual predicate but on application of an erroneous legal standard.

[5] Whether the Chess Club is subject to a per se rule of noncurriculum relatedness, and whether, if not, WHS' Chess Club was curriculum related, are discussed in our Opening Brief at 56-70, 75-76.

the record[6] to demonstrate that Rotary International and Zonta, the 'parent' organizations of WHS' Interact and Zonta

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[6] The most egregious example of Students' efforts to relitigate this case is Professor David Moshman's amicus brief directed to the issue of impressionability, the very issue on which he testified as the students' paid expert. [J.A. 379-400; Tr. 556]. Contrary to a concession he made at trial that the maturation of young adults is a gradual and uneven process [J.A. 394-45], Moshman's amicus brief states baldly that high school students are as mature as college students [pp. 10-12]. The impropriety is heightened because the attorneys for amicus Moshman appear to be the students' counsel of record's former law firm.

If this Court were the forum to try this case, we would cite a recent study, located through DIALOG, ERIC, File 1, L. Rossow and N. Dort, School Neutrality or Endorsment: Students' Perceptions of Religious Extracurricular Activities, (March 1987), in which high school and college students were questioned as to their respective abilities to distinguish between school neutrality and school endorsement of student religious clubs. The study found high school students substantially less able to make such a distinction than college students. This study suports WHS officials' testimony [J.A. 423-25; 435-37] that WHS students could not make that distinction.

clubs, have "specific philosophic commitments." [U.S. Brief at 29].

Both Respondents imply that Zonta and Rotary International actually exercise control over their WHS affiliates, whose existence, therefore, is said to trigger the Act. [U.S. Brief at 29; Students' Brief at 27]. Confusing religious neutrality with anti-religious animus, see e.g., Engel v. Vitale, 370 U.S. 421, 433-34 (1962), the students assert further [Brief at 27-28] that, by sponsoring a group sharing Rotary's viewpoint, the school has engaged in constitutionally impermissible viewpoint discrimination.

Respondents are not entitled to relitigate their case here since Petitioners are thereby denied an opportunity to challenge their "proof".[7] At least

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[7] Witters v. Washington, 474 U.S. 481, 486, n.3 (1986); New Haven Inclusion

two shortcomings in this proof are immediately apparent. Respondents introduced no evidence on the relationship between the national and local Zonta groups, and, even more, they failed to demonstrate that Rotary's self-serving claim that it "controls" Interact is in fact true with regard to WHS' Interact.

National organizations frequently assert, but do not in fact exercise, control over affiliates. The need for proof of actual control is particularly acute here, because Interact is also controlled by WHS, a closer-to-home entity with far greater ability and authority to control its activities than the putative national sponsor.[8]

Compounding the inadequacies of their belated evidentary submission,

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Cases, 399 U.S. 392, 450, n.66 (1970).

[8] Rotary had little to do with WHS' Interact. School officials testified that WHS' recognition of Interact was not

Respondents wholly fail to demonstrate that the "specific commitments" of Rotary and Zonta are unrrelated to the curriculum.

2. Peer Advocates Does Not Trigger The Act

Peer Advocates was created at the suggestion of a faculty member [J.A. 235; Tr. 275] to "get kids involved in working with handicapped students and to work with them and to become friends with them to understand their handicaps whatever they might be, and to help them feel more a part of WHS." [J.A. 232].

The students suggest that a club is "student initiated," 20 U.S.C.—

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construed by the school or by the students as constituting approval of Rotary International. [J.A. 436-438]. "Interact [was] . . . unrelated, really, to Rotary." [J.A. 438]. Asked "whether [Rotary's creed] is part of the thrust of . . . [Interact]," Dr. Findley responded "I've never seen it if it is, and I've never heard it discussed with kids." He doubted that "you could find kids [in Interact] that would know what that [Rotary Creed] was." [J.A. 288].

§4071(c)(1) if it is begun at the suggestion of students. [Students' Brief at 16]. Having been initiated by a faculty member, Peer Advocates is not a "student initiated" club, as groups triggering the Act must be. In fact, the students' entire case is deficient since they did not prove which, if any, noncurriculum related clubs were begun at the behest of students.[9]

Respondents accurately report the "evil" at which the Act was directed: a

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[9] The legislative history suggests the phrase "student-initiated" was meant to exclude groups controlled by outside adults. 130 Rec. Cong. Rec. 19,218 (remarks of Senator Hatfield); Id. at 19,224 (remarks of Senator Hatfield); Id. at 19,223 (remarks of Senator Hatfield); Id. at 19,236 (remarks of Senator Levin); Id. at 12,239 (remarks of Senator Durenberger); Id. at 19,243 (remarks of Senator Dole).

When our Opening Brief was prepared, the only Congressional Record citations available were to the daily edition. The permanent edition has since become available and is cited in this Reply Brief.

perceived pattern of unjustified discrimination against student religious speech. [Students' Brief at 41; U.S. Brief at 14-16]. Peer Advocates does not serve as a vehicle for student speech. Rather, it serves the institutional needs of the school, needs the United States concedes do not trigger the Act. U.S. Brief at 23, n. 30.

Federal law requires that "to the maximum extent appropriate handicapped children . . . [be] educated with children who are not handicapped." 20 U.S.C. §1412(5). Accord Neb. Rev. Stat. §79-3317. These statutes impose real world burdens on schools, other students, and the handicapped.[10] Peer Advocates eases those burdens, and educates non-handicapped high school students to

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[10] See Honig v. Doe, 108 S.Ct. 592 (1988); Board of Educ. v. Rowley, 458 U.S. 176 (1982); Monahan v. School Dist., 229 Neb. 139, 425 N.W.2d 624 (1988).

overcome their prejudices about the handicapped,[11] [Tr. 275]. It does not trigger the Act.

D. Sponsors Exercised Substantial Authority Over All Clubs

Citing the testimony of fellow students, the students claim [Brief at 35], that "teachers [at WHS] play the role of custodial monitors and do not 'instruct' in any sense, in the majority of these group meetings." Accordingly, they dismiss the contention [Brief at 54-55; U.S. Brief at 28-30] that dispensing with a sponsor for the Christian Bible Club would substantially alter WHS' club program.

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[11] While Dr. Findley testfied that Peer Advocates was not directly related "to any of the required curricular or elective courses at WHS," [J.A. 231], he also explained that it was curriculum related because it was "another activity that would allow kids to become aware of how to work with others as service activity, something that our overall goals and mission would definitely endorse." [J.A. 232].

This argument, too, rests on a false factual premise. As found by the District Court, sponsors were required by WHS to actively supervise clubs. [App. Pet. B 22-23]. Because clubs foster student confidence and give students a greater opportunity to exercise leadership than is possible in the formal classroom setting, sponsors afford clubs substantial independence. [J.A. 239; 374-375]. Nevertheless, ultimate responsibility for ensuring that each club furthers the goals and mission of WHS and complied with the "balance" requirement remains with sponsors.[12]

That not all clubs had a sponsor present at all times, or that a few teachers took advantage of an opportunity

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12 Dr. Findley testified [J.A. 247-48]:

Q. [Are clubs] different from the classroom . . . where you have a teacher present all the time to monitor the

to be paid for not working, creates neither a constitutional limited public forum, Perry Educ. Ass'n v. Perry Local Educ. Ass'n, 460 U.S. 37 (1983), nor a statutory one under the Act, which speaks

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discussion and the flow of the discussion . . .?

A. Right, and to make sure both sides are presented.

Q. So the club structure is different in that respect, right?

A. No. I would think it's the same. The sponsor has got a responsibility for the content and what takes place in the club or activity.

Q. But he is not always there to monitor that, right?

A. Can't always be there . . . . There is no way the sponsor could begin to meet . . . some of the time lines that young people set up to get ready for things . . . .

Q. So it is your testimony . . . that the sponsor . . . is there to monitor the speech that goes on in the club?

A. No, that's not my testimony. That person is there to make sure that club is organized and follows the organization that is pre-arranged and described to us, and I've got a trust in that individual that that is done.

of choices by a school, 20 U.S.C. §4071(b), not choices foisted upon it by the misfeasance of its employees.

II

THE STUDENTS' CONSTITUTIONAL CLAIMS ARE WITHOUT MERIT

A. Tinker and Healey Do Not Control This Case

The United States asserts that this case should be resolved solely on the basis of the Equal Access Act. [U.S. Brief at 14, n.15]. The students prefer that it be resolved on the free speech principles laid down in Tinker v. Des Moines Ind. School Dist., 393 U.S. 503 (1969) and Healy v. James, 408 U.S. 169 (1972).[13] [Students' Brief at 18, n. 22]. Neither case controls here.

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[13] The students raised a Free Exercise claim on which neither court below passed. Beyond an isolated sentence in a long footnote, they do not press that claim here. [Brief at 18, n. 24]. All courts faced with identical claims have rejected them. Brandon v. Bd. of Educ., 635 F.2d 971, 977-78 (2d

In Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562 (1988), this Court held Tinker inapplicable to speech, such as WHS' club program, which is, or might easily be mistaken to be, school sponsored speech. Healy v. James preceded the application of public forum analysis to access cases. And Healy involved viewpoint discrimination, 408 U.S. at 187, impermissible even in a nonpublic forum. As demonstrated in our Opening Brief at 53, n. 27, this is not a viewpoint discrimination case.

B. WHS' Rules Are Not Unconstitutionally Vague

The students assert that WHS' club policy is impermissibly vague. [Brief at

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Cir. 1980); Bender v. Williamsport Area School Dist., 563 F.Supp. 697, 701-03 (M.D. Pa. 1983), rev'd, 741 F.2d 538 (3d Cir. 1984) rev'd on other gds, 475 U.S. 534 (1986); Bell v. Little Axe Ind. School Dist., 766 F.2d 1391, 1400, n. 6 (10th Cir. 1985).

31-33]. Whatever vagueness exists is inherent in the concept of "curriculum" which is the basis of that policy. Neither the Act nor any party to this proceeding has succeeded in defining that term with any precision. Indeed, as the students' expert testified, educators have not agreed upon a uniform definition of "curriculum." The vagueness doctrine does not demand more precision than language is capable of providing. Grayned v. City of Rockford, 408 U.S. 104, 110 (1972).

The students' vagueness argument is specious for other reasons. Board of Educ., Island Trees Union Free School Dist. v. Pico, 457 U.S. 853, 864, 876, 889 (1983), holds that schools are free to convey points of view. In choosing a point of view schools need not be constrained by narrowly drawn rules, for, as this Court wrote in Hazelwood School

District v. Kuhlmeier, 108 S.Ct. 562, 571, n. 6: "[T]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate."

The students are correct [Brief at 23, n. 28] that WHS's "balance" requirement is an "unheard theory of law." Balance is a theory of education, not law; it is a theory fully consistent with the Constitution.

III

THE UNITED STATES' INTERPRETATION OF THE ACT PROMOTES UNCERTAINTY

The students' brief is less than lucid in its exegesis of the Act. The United States, by contrast, presents a comprehensible and not entirely implausible reading of the Act, with which we have two main points of difference:

(1) we think, but the United States disagrees, that the Act leaves the

definition of curriculum to school officials and that it does not require a "one-to-one" relationship [U.S. Brief at 28] with a specific course offering for a club to qualify as curriculum related; and

(2) we think, but the United States disagrees, that the Act should be interpreted to parallel Widmar and the public forum doctrine.

A. The Act Leaves the Definition of Curriculum to School Officials

1. Curriculum Should Not Be Defined By Reference to Popular Dictionaries

The Act does not define the triggering phrase "noncurriculum related," although it does have a definitional section. 20 U.S.C.§4072. The Court of Appeals attempted to fill this gap by looking to the legislative history for clubs cited as noncurricular. That unsatisfactory approach would include as noncurricular some clubs both Respondents

view as curricular. For example, Senator Mattingly thought math and science clubs,[14] and Representative Lloyd thought the debate club,[15] were noncurriculum related.

Respondents attempt to fill the gap by quoting different general-purpose English dictionaries. Each asserts that the popular meaning should be controlling. [Students' Brief at 36; U.S. Brief at 23].

The United States' definition of curriculum, found in Websters' New World Dictionary (2d College Ed. 1974), would limit the curriculum to a "fixed series of courses . . . required for graduation," [U.S. Brief at 23], apparently excluding clubs required as adjuncts to elective courses not required for graduation. According to the students'

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[14] 130 Cong. Rec. 19, 242.

[15] 130 Cong. Rec. 20, 941.

proferred definition, taken from Webster's Third International Dictionary Unabridged (1986), extracurricular means:

> of or relating to officially or semiofficially approved and organized student activities (athletics, dramatics, or publications of a school newspaper) connected with the student school and usually carrying no academic credit.

It is telling that each of the three examples cited in Websters Third as "extracurricular" (and many noncurriculum related activities under the United States' definition) is curricular for purposes of the Act. For example, neither Respondent now contends that WHS' drama club was not curriculum related. And in Hazelwood, a school newspaper was held to be part of a school's curriculum. 108 S.Ct. at 568-569.

Similarly, the legislative history could not be clearer that athletic

teams do not trigger the Act. 130 Cong. Rec. 19,223 (remarks of Senator Hatfield); 130 Cong. Rec. 20,942 (remarks of Rep. Goodling). Presumably few, if any, school districts in the country offer academic courses on football or basketball, yet most secondary schools have such teams. Under Respondents' dictionary definitions, these programs trigger the Act, a possibility Congress rejected.

It makes little sense to apply an imprecise popular definition to a technical term in a statute directed at professionals, for many of whom that term has a very different meaning. As the students' own expert admitted, [J.A. 406-408], a recognized body of educational thought defines curriculum in the same broad way as do officials at WHS.

A recent encyclopedia of education begins its definition of "curriculum" by

noting that it is "a complex term that has no agreed upon definition" and concludes "curriculum is more than just a program of studies or a sequence of courses to be followed by the student." E.L. Dejnozka & D.E. Koppel, American Educators' Encyclopedia, p. 141, s.v. Curriculum.[16]

The view of curriculum taken by WHS officials is not the only possible one. It is enough that it is a possible one. A flexible construction of ~~the~~ statute

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[16] The United States suggests [Brief at 29] that the explanations offered by school officials are ad hoc rationalizations, not "a guiding principle." What the United States fails to note is that the "Mission and Goals" of WHS [J.A. 473-478], which is the basis for the school officials' testimony, is a direct descendent of the pathbreaking report, Seven Cardinal Principles of Secondary Education, of the Commission on the Reorganization of Secondary Education (1918), the formative document of contemporary American secondary education. See W. Sybouts & W.J. Krepel, Student Activities in the Secondary School (1984) at 47; L.A. Kremin, American Education: The Metropolitan Experience: 1876-1980 (1988) at 232-233.

recognizes that there is no agreed upon definition of curriculum. While protecting students' rights, it also respects local control of education as Respondents' proposed definitions do not.

2. The Direct Relationship Between Course and Club Is Not To Be Rigidly Defined

In addition to defining curriculum in the narrowest possible academic terms, the United States would require a "one-to-one" relationship between a course and a club for that club to qualify as curriculum related. [U.S. Brief at 28].

The United States concedes that the legislative history is "not completely clear" and that there are "contrary indications in the legislative history." Nevertheless, it argues that "on balance," the legislative history reinforces the view that "the Act exempted from the "non-curriculum

related" category "only those clubs closely connected to courses offered by the school." [U.S. Brief at 23-24]. It argues that this reading of the history best fits the statute's definition of a "meeting" as an activity of a student group "not directly related" to the school curriculum. 20 U.S.C. §4072(3).

The United States' view artificially combines a speech in the House delivered by Representative Goodling, 130 Cong. Rec. 20,942, setting forth a two-part test for curriculum relatedness, and a colloquy in the Senate in which Senator Hatfield, chief Senate sponsor of the Act, described curriculum related clubs as "a kind of extension of the class-rooms."[17] 130 Cong. Rec. 19,223.

There are several things wrong with this position. First, it assumes that

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17 Perhaps the United States should also insist, as did Representative

the two tests are identical, a highly strained reading of both statements. Second, it makes Senator Hatfield's position in the colloquy internally inconsistent. Immediately after the remarks quoted by the United States, Senator Hatfield emphasized that no hard and fast rules could be laid down about whether a particular club -- a chess club was the example he used -- was or was not curriculum related because school boards, not Congress, define curriculum. That view was echoed by Representative Goodling. 130 Cong. Rec. 20,941.

Third, it reads Senator Hatfield's "extension of the classroom" remark too narrowly. Schools can extend the classroom in many ways, not only in the

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Goodling in the remarks quoted by the United States, that to be curriculum related, a school must "requir[e] or directly encourag[e] participation in such groups in connection with curriculum course work." Curiously, the United States ignores this requirement.

grudging, narrow and didactic fashion the United States insists the Act requires. Its definition puts educators into a straitjacket, and limits the curriculum to traditional subjects taught in traditional ways.

A school which wants to retain a closed forum, but also wants to create a club which would emphasize abstract skills used in several courses, or expose students to a new subject where there might not be enough interest to warrant offering a full-fledged class (or, as was the case with the WHS' Photography Club, [J.A. 444-445] some other reason prevents the conduct of a formal class), would be faced with a Hobson's choice not intended by Congress.

Finally, the United States assumes, contrary to the role schools must play in these days of AIDS, drug abuse, teen-age pregnancy and the breakdown of the

nuclear family, that it is enough for schools to pass on information, and that shaping attitudes, behavior, citizenship skills, and a host of other skills and values are all beyond the legitimate purview of the curriculum of the 20th century high school.[18] In fact, WHS' Mission and Goals statement [J.A. 473-478], reflecting these realities, charges the school with meeting these contemporary needs. Congress could have explicitly limited the schools to a narrower vision. But there is nothing to suggest that it took such a drastic step.

3. WHS' Definition of Curriculum Would Not Eviscerate The Act

It is simply not the case, as the United States charges, that WHS' definition of curriculum would eviscerate the

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[18] See J.S. Coleman, Families and Schools, 16 Educ. Research (June/July 1987) at 32-38; S.B. Heath & M.W. McLaughlin, A Child Resource Policy: Moving Beyond Dependence on School and Family, Phi Delta Kappan (March 1987).

Act. Plainly, sham assertions of curriculum relatedness are inadequate to avoid triggering the Act. Courts routinely scrutinize all sorts of claims to determine whether they are shams. They can do so here just as easily.

The United States' accusations are not backed up by any studies showing that schools are attempting en masse to evade the Act. On the contrary, the only reported study we could locate found that only five percent of schools have closed forums and would bar student religious clubs. Of schools actually receiving requests for such meetings, more than seventy percent granted them.[19]

Obviously, many districts narrowly define curriculum. Others serve as

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[19] American Association of School Administrators, Equal Access' Interpretation and Implementation Guidelines (n.d.). The study did not inquire into the reasons for denying access to religious clubs.

community centers where all manner of student groups are permitted because no other opportunity exists for adolescents to associate. Some few districts may wish to encourage religious speech, or not be seen as hampering it.

Moreover, although the United States roots its narrow reading of the Act in its plain language, it elsewhere concedes that the Act cannot be taken literally. Explaining the requirement that triggering clubs be "student initiated," 20 U.S.C. §4071(c), the United States [Brief at 23, n. 30] concedes that:

> those activities that are sponsored by a school as part of its administration or participation in the larger educational system -- presumably indicating activities like yearbook groups and participation in national contests

are curriculum related.

The United States appears to confuse the issue of curriculum-relatedness with

the different issue of student initiation. Be that as it may, Peer Advocates, as well as National Honor Society and student government, fall squarely within the United States' proposed exemption. A chess club would as well, if it participated in an inter-scholastic chess tournament.

And since there is no a priori reason why "national contests" are more related to the "administration" of the school than service clubs[20] or other national affiliations such as Zonta or Rotary, the United States' position is subject to the criticism that it create

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[20] WHS' insistence on inculcating in its students the importance of service to others as part of its "mission and goals" is hardly idiosyncratic. On the contrary, it has received widespread endorsement. See E.L. Boyer, Service: The New Carnegie Unit in High School in A Report on Secondary Education in America (1983) (ch. 12); B.F. Brown, New Directions for the Comprehensive High School (1972) (ch. 3).

an exception which would swallow up the Act -- the very charge it levels at our interpretation of "curriculum." Our definition, at least, has the redeeming virtue of leaving educational decisions to school officials.

B. The Act Should Be Interpreted In Tandem With Widmar v. Vincent

The United States rejects the District Court's holding that the "Act's applicability turns on whether or not the public secondary school has created a limited open forum." [U.S. Brief at 22, n. 29, quoting Pet. App. B. 14].[21] While agreeing that Widmar provides the backdrop for the Act, it argues that Congress went beyond Widmar in order to eliminate "confusion and uncertainty" in the law. [U.S. Brief 20-21]. In particular, it points to 20 U.S.C.

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21 The Court of Appeals agreed that the Act "codified the Supreme Court's decision in Widmar v. Vincent . . . ." [Pet. App. A. 15].

§4071(b) prescribing that a limited open forum exists whenever "one-or-more" non-curriculum related groups [are permitted] to meet . . . . (emphasis added).

According to the United States, [Brief at 28], this "one-or-more" language severs the relationship between the Act and Widmar's constitutionally based public forum. In fact, the phrase was intended to make clear that the school's mere assertion of a closed forum, when in practice it intended and has a limited forum, does not suffice to avoid triggering the Act. See Opening Brief at 66.

The position of the United States would come as a surprise to the many Senators who spoke after the author of the "one-or-more" language, Senator Leahy, explained it. Those Senators

explained that the Act simply extended Widmar to high schools.[22]

Moreover, it would be surprising for Congress, so emphatic in its reliance on Widmar, to have departed from Widmar in a way that raised questions left open in Widmar. In rejecting an Establishment Clause defense in Widmar, this Court emphasized that, in fact, there were a large number of clubs operating on campus. 454 U.S. at 275. It pointedly left open the question of whether a forum dominated by a religious group would pose a different question. Id. The United States invokes these very principles in urging the constitutionality of the

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22 See, e.g., 130 Cong. Rec. 19,223 (Senator Hatfield); Id. at 19,236 (Senator Levin); Id. at 19,237 (Senator Bumpers); Id. at 19,238 (Senator Durenberger); Id. at 19,239 (Senator Bidon); Id. at 19,242 (Senator Jepsen); id. at 19,243 (Senator Dole); See also Id. at 20,935 (Rep. Bonker).

application of the Act to this case. — [U.S. Brief at 46].[23]

Yet, paradoxically, the United States also urges a construction of the Act which could lead to a two group forum, one secular, one religious, with the latter dominating the forum -- for example, a school with just a five person chess club and a two hundred person Christian Bible Club. Under the United States' view, Congress took the bizarre step of creating a constitutional trap, based on the very decision which members of Congress thought served as a model for avoiding it.

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[23] The United States suggests that this aspect of Widmar is no longer good law because Mueller v. Allen, 463 U.S. 388, 401 (1983) held that constitutional law should not be made dependent on factual questions. The Court has not adhered to this view in subsequent Establishment Clause cases. Bowen v. Kendrick, 108 U.S. 2562 (1987); Allegheny County v. ACLU, 109 S.Ct. 3086 (1989).

Amici Burr suggests [Brief at 12] that our argument that the Act is to be interpreted in light of the constitutional forum doctrine is based on the mistaken equation of the term "limited public forum," the language of Widmar, with the term "limited open forum," used in the Act. If there a difference between an open and a public forum, amici do not state it. It is a difference which has eluded this Court as well, which uses the phrases interchangeably.[24] And it is a difference no member of Congress thought significant enough to explain.

[24] Widmar itself uses the public forum phraseology. Yet, in describing Widmar, this Court has referred to is as an open forum case. Hernandez v. C.I.R., 109 S.Ct. 2136, 2146 (1989) (describing Widmar as an "open" forum case); Bowen v. Kendrick, 108 S.Ct. 2562, 2585, n. 4 (1988) (Blackmun, J., dissenting) (same); Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562, 568 (1988) (describing Widmar as a public forum case); cf. Bender v. Williamsport Area School Dist., 475 U.S. 534, 552 (1986) (Burger, C.J. dissenting) (describing Widmar as "a forum generally open to student groups.")

IV

THE STUDENTS SEEK SCHOOL ENDORSEMENT OF THEIR RELIGIOUS ENDEAVOR

Respondents devote many pages to the facial constitutionality of the Act, an issue we do not raise in this Court. Rather, we argue only that, since all clubs at WHS are school sponsored, requiring WHS to recognize a Bible Club amounts to a demand for official sponsorship of religion.

The United States [Brief at 30] argues that this problem could be avoided if WHS waived its insistence on a sponsor for the Christian Bible Club. This, however, greatly oversimplifies the school's problems. First, the presence of a teacher sponsor is only one of the indicia of school sponsorship. So, for example, is access to the PA system or participation at Club Fair, rights the students have demanded. [J.A. 58, ¶13].

More importantly, the Act itself prohibits discrimination against "any student." (§4071(a)). Another section of the Act, §4071(c)(2), contemplates no discrimination between religious and other student clubs. A waiver of a faculty advisor in the case of religious clubs only could be viewed by student members of ideological clubs -- say, an anarchist's or libertarian's club -- as discrimination against them. Thus, unless the United States is urging the Court to ignore the Act's core non-discrimination principle, an affirmance would significantly alter WHS' club program.

CONCLUSION

When all is said and done, neither Respondent takes the Act literally. Each recognizes categories of clubs which, though "noncurricular," do not trigger the Act. The United States goes further

and recasts the Act to take into account what it obviously recognizes to be the legitimate concerns of school officials. Respondents' ad hoc exemptions do not provide school officials the sure guidance Congress contemplated.

If our approach is also not entirely free of difficulties, it allows for the fulfillment of the overall purpose of the Act, while leaving educational decisions where they belong, not with students or judges, but with school officials.

The judgment should be reversed.

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OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66) *et al.*,
Petitioners,
v.
BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	2
ARGUMENT	2
I. INTRODUCTION	2
II. THE EQUAL ACCESS IS FACIALLY UNCONSTITUTIONAL	4
A. Congress Did Not Have a Secular Purpose in Passing the Act	4
B. If the Court of Appeals' Interpretation of "Noncurriculum Related" Is Correct, the Act Has the Primary Effect of Advancing Religion	10
III. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF "NONCURRICULUM RELATED"	13
IV. PETITIONERS' REFUSAL TO ALLOW RESPONDENTS TO MEET DOES NOT VIOLATE THEIR FREE SPEECH RIGHTS	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Abington School District v. Schempp, 374 U.S. 203 (1983) 2
Aguilar v. Felton, 473 U.S. 402 (1985) 5, 12
Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984) 3, 6, 26
Bethel School Dist. v. Fraser, 106 S. Ct. 3169 (1986) 2, 20, 22
Blanchard v. Bergeron, 109 S. Ct. 939 (1989) 14
Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982) .. 22, 23
Board of Education of Rogers, Ark. v. McCluskey, 458 U.S. 966 (1982) 23
Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985) 27
Edwards v. Aguillard, 482 U.S. 578 (1987) 4
Engel v. Vitale, 370 U.S. 421 (1962) 2, 7
Epperson v. Arkansas, 393 U.S. 168 (1968) 4
Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985) 27
Garnett v. Renton School Dist. No. 403, 865 F.2d 1121 (9th Cir. 1989) 23
Garnett v. Renton School Dist. No. 403, 874 F.2d 608 (9th Cir. 1989) 23, 24
Grand Rapids School District v. Ball, 473 U.S. 373 (1985) 11
Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988) 2, 16, 22, 27, 28
Lemon v. Kurtzman, 402 U.S. 602 (1971) 3, 4, 11
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1158 (1983) 3, 6, 8
Marsh v. Chambers, 463 U.S. 783 (1983) 11
McCollum v. Board of Education, 333 U.S. 203 (1948) 2
Perry Educ. Ass'n v. Perry Local Education Ass'n, 460 U.S. 37 (1983) 11
Stone v. Graham, 449 U.S. 39 (1980) 4
Wallace v. Jaffree, 472 U.S. 38 (1985) 4, 5, 10

TABLE OF AUTHORITIES—Continued

Page

Widmar v. Vincent, 454 U.S. 263 (1981) 3, 4, 11, 22, 25, 26, 28, 29
Wood v. Strickland, 420 U.S. 308 (1973) 23

STATUTES:

Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989) 1, 2, 13, 21

OTHER AUTHORITIES:

130 Cong. Rec. S8331, S8336-38, S8342-44, S8348 (daily ed. June 27, 1984) 3, 5, 6, 7, 8, 10, 15, 22
130 Cong. Rec. H7726 (daily ed. July 25, 1984) (statement of Rep. Bonker) 7
130 Cong. Rec. H7730, H7732-33, H7782 (daily ed. July 25, 1984) 8, 10, 15, 25
Developing a Student Leadership Class (NASSP 1977) 20
Ferguson, J., *Student Council Activity Resource Book* 1 (NASSP 1980) 19
Ferguson, J., *Student Council Projects* v, 75 (NASSP 1982) 19
Gholson, R. and Buser, R., *Cocurricular Activity Programs in Secondary Schools* v (NASSP 1983) 19
NASSP, *National Honor Society Handbook* 1 (1984) 20
New York Times, July 25, 1984, *printed in* 130 Cong. Rec. at H7728 (daily ed. July 25, 1984) 7
Statement of Dale D. Hawley in Foreword to Biernat, N. and Klesse, E., *Student Activities* v (National Association of Secondary School Principals (NASSP) 1989) 18
Statement of Terrence J. Giroux in Christensen, D., *Managing School Activities* v (NASSP 1984) 19

BRIEF *AMICUS CURIAE* OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Nearly all public school districts receive federal financial assistance and, therefore, are subject to the requirements of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989). In addition, all public school districts are subject to the free speech clause and the establishment of religion clause of the first amendment.

The court of appeals decision removes the discretion of school districts to make decisions about the type of clubs they wish to sponsor. As the law now stands, a school's only safe alternative is to refuse to allow any club or organization to meet during the school day in order to assure that the school does not violate the constitutional or statutory rights of any child.

This brief is filed with the consent of counsel for petitioners and respondents. A letter granting universal consent to all *amici curiae* is on file with this Court.

ISSUES PRESENTED FOR REVIEW

1. Does the Equal Access Act unconstitutionally establish religion?

2. Did the Court of Appeals err in its broad interpretation of "noncurriculum related"?

3. Does Petitioners' student activities program violate respondents' free speech rights?

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief by Petitioners.

ARGUMENT

I. INTRODUCTION.

Public institutions often find themselves in the position of having to choose between violating free speech or free exercise rights of individuals and risking establishing religion. Because of the unique nature of the public schools, these risks are even greater than in other forums. Also, because of the unique nature of the public schools, many establishment of religion cases involve public schools. *E.g., Abington School District v. Schempp*, 374 U.S. 203 (1963) (scripture reading and reciting Lord's Prayer in classrooms); *Engel v. Vitale*, 370 U.S. 421 (1962) (reciting in classrooms prayer written by state); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religion classes as part of curriculum). In addition, a number of "exceptions" to an unfettered free speech right have been drawn in school cases. *E.g., Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *Bethel School Dist. v. Fraser*, 106 S. Ct. 3169 (1986).

The Equal Access Act makes it unlawful for any public secondary school which receives federal funds and operates a "limited open forum," to deny "equal access" to students "who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). A school operates a "limited open forum" if it allows one or more "noncurriculum related" clubs to meet in the school during "noninstructional time." *Id.* at § 4071(b).

The first version of the Act designed by many of its sponsors to bring prayer back to the schools was substantially reworked, with the assistance of drafters from the American Civil Liberties Union, the National Education Association and others seeking to limit the religious effect of the Act and place the schools in a passive role of

assuring that all students have an equal right to expression. 130 Cong. Rec. S8338 (daily ed. June 27, 1984).

Much of the impetus for the Act came from two court decisions. Shortly before passage of the Act, the Third Circuit Court of Appeals in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), overturned a district court decision requiring the school to allow religious clubs, under a "free speech" theory, to meet in the schools during the "activity period." The circuit court held that elementary and secondary level schools may not allow religious groups to meet because allowing such conduct during school hours gives the "impression" to young students that the school is sponsoring the religion, even though the school may in fact only be attempting to guarantee free speech rights of all students. The court held that the establishment clause holds a higher rank than the free speech clause, and therefore, must take precedence when the two clauses conflict.

Earlier, the Fifth Circuit in the case of *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1158 (1983), reached the same conclusion. However, unlike the Williamsport School District, the Lubbock district had for many years prior to the adoption of its "open access" policy, officially sponsored religion by allowing Bible readings in the classroom, prayers over loudspeakers in the school, school assemblies with evangelistic speakers and distribution of Gideon Bibles to students.

The case at bar raises the question of the constitutionality of the Equal Access Act and the question of whether this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), applies to secondary schools. As to the first question, under this Court's decision in *Lemon v. Kurtzman*, 402 U.S. 602 (1971), a state policy or practice first, must have a secular purpose, second, must have a primary effect that neither advances nor inhibits religion and third, must not foster an excessive government entanglement with religion. *Amicus* submits that the Act does not pass

the first prong of the test, and its ability to satisfy the second prong depends on whether the Court agrees with the court of appeals' interpretation of "noncurriculum related." If that interpretation is incorrect, the decision should be reversed, because under a narrower reading of the statutory language, the school district is not operating a "limited public forum" and thus, is not subject to the requirements of the Act. If the court's interpretation is correct, the Act has the primary effect, as applied to religious clubs, of advancing religion.

Finally, *Amicus* requests that the Court address the question of whether the *Widmar* standard applies in the public secondary school context and, if so, whether Petitioners have violated that standard. *Amicus* submits that although *Widmar* may apply to school districts in some circumstances, the standard to be applied in determining whether a school is operating a "limited open forum" is not the same as that in a university. *Amicus* further contends that Petitioners were not operating a "limited open forum" in this case and, therefore, are not subject to *Widmar*.

II. THE EQUAL ACCESS ACT IS FACIALLY UNCONSTITUTIONAL.

A. Congress Did Not Have a Secular Purpose in Passing the Act.

Since its decision in *Lemon v. Kurtzman*, this Court has held that a law must have a secular purpose in order to pass constitutional muster. The three-pronged test in *Lemon v. Kurtzman* requires in addition to a secular purpose, that the "principal or primary effect [of the law] must be one that neither advances nor inhibits religion" and, finally, the statute must not foster "an excessive entanglement with religion." *See, e.g., Stone v. Graham*, 449 U.S. 39 (1980) (posting of the Ten Commandments in public school classrooms); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence for prayer and silent meditation); *Epperson v. Arkansas*, 393 U.S. 168 (1968) (statute barring teaching of evolution); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statute forbidding teaching of evolution); *Aguilar v. Felton*, 473 U.S. 402 (1985) (use of Chapter I funds to pay teachers providing services on religious school premises).

In *Wallace* the Court opined that the *Lemon* test does not require the intent to be entirely secular, but it found that the Alabama legislature's "intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." 472 U.S. at 59. The Court noted that an earlier Alabama law on the subject of moment of silence would have protected that right; thus, there was no reason to add the words "and voluntary prayer" except to evidence the state's "endorsement" of religion and prayer. "Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id.* at 60.

Similar facts are evident with respect to the Equal Access Act. There was no reason to include the word "religious" in the Act if, indeed, its purpose was to grant equal access to *all* groups. The Congress' debate on the Act belies its avowed intent to codify the free speech clause as to elementary and secondary schools. And, unlike the situation in *Wallace*, the Court need not resort to testimony in court after passage to determine the intent of the Act's sponsors. The intent is apparent from the legislative history itself.

The bill that was ultimately passed as the Equal Access Act was an amended version of a bill introduced by Senators Denton and Hatfield which read as follows:

> Denton-Hatfield Amendment No. 3152 to provide that it shall be unlawful to deny equal access to students in public secondary schools who wish to meet voluntarily for religious purposes and to provide district courts with jurisdiction over equal access violations. 130 Cong. Rec. S8331 (daily ed. June 27, 1984).

Although the bill that finally passed as the Equal Access Act broadened the coverage of Denton-Hatfield Amend-

ment No. 3152, the sole interest of its sponsors, and of most of those who voted for the Act, was in providing access to religious groups and overturning the effect of the decisions in *Williamsport* and *Lubbock*. Senator Denton on a number of occasions during floor debate, as exemplified in the statements set forth below, made it clear that the intent of both his original bill and the bill which ultimately passed, was to bring religion and prayer back to the public schools.

> Back to the discrimination which this amendment would eliminate. I emphasize that the discrimination involved applies only to religious activities, that the amendment before us applies only to religious activities. . . .
>
> There is broad support for equal access because it is a fundamentally fair, well drafted, and reasonable approach to the problems of religious expression in public schools. *Id.* at S8336.
>
> The question before us is whether or not we are going to continue to exist in the condition which began in 1962-63 and which prohibits the mention of the word "God" in the Jewish, Moslem, Christian, or whatever context, in a reverent, orderly sense, in a sense of assembly, if you will, voluntary on the part of the students. Are we going to restore that right in public schools, or are we going to continue to maintain the situation to which the great majority of Americans of all faiths object, in which the name of God cannot be mentioned except profanely in public schools?
>
> I believe that that basic question is that which underlies the yea or nay on the two amendments. . . .
>
> I want to go back to the underlying amendment's purpose in order to discuss the one under consideration now, which is a perfecting amendment.
>
> The underlying amendment focuses on religious speech for the simple reason that it is religious speech which has been singled out for censorship in public schools. Please let us not forget that as we consider this matter. *Id.* at S8348.

The event that took place in 1962-63 to which Senator Denton refers is, of course, this Court's decision in *Engel v. Vitale*, 340 U.S. 421 (1962), which held that a public school's practice of allowing prayer in the classroom violates the establishment clause. Members of the House, too, commented on that decision. *See* 130 Cong. Rec. H7726 (daily ed. July 25, 1984) (statement of Rep. Bonker).

During the time during which Congress was debating the bill, Senator Denton was encouraging his colleagues to vote for the measure in order to get a religious foot in the door. "A sealed door has had its seal broken . . . We can probably get it to grade schools." *New York Times*, July 25, 1984, *printed in* 130 Cong. Rec. at H7728 (daily ed. July 25, 1984).

Only a handful of members and senators who participated in the debate expressed support for the bill because it granted equal access to *all* groups. The tenor of the argument was that religion should be allowed back in the schools. Senator Dixon, for example, stated:

> Mr. President, as a co-sponsor of the amendment to permit equal access for student religious groups, I urge my colleagues to support the amendment.
>
> My position on this issue is the same today as it was back in March 1984 when the Dixon amendment included a similar provision in the silent school prayer and silent reflection amendment to Senate Joint Resolution 73. . . .
>
> Mr. President, this is a good amendment. Its time has come. I sincerely believe that we should have an equal access provision that permits high school students who want to discuss religious matters to come together on a voluntary basis in the public schools to follow the dictates of their own conscience and their own religious desires. This amendment does just that. 130 Cong. Rec. S8338 (daily ed. June 27, 1984).

Similarly, in the House, Representative Clinger argued fervently on the issue of why religion should be brought back into the schools.

> We must strive to keep these facts [citing examples of religion in other aspects of public life] in mind. Religion and the belief in God helped to shape and mold our great Nation. The proof is in our art, our literature, and in our Government institutions. Must we now, as political descendants of our devoutly religious Founding Fathers, ignore the rights of individuals to religious freedom?
>
> Please, I strongly urge you to vote for the equal access resolution today. If you may have trouble deciding, reach into your pockets and grab a coin, for on that coin are four simple words which tell the whole story of our proud Nation. Those are the words "In God We Trust." If this Nation truly believes that, then surely in God we Americans do trust. *Id.* at H7730 (daily ed. July 25, 1984).

Senator Hatfield, undoubtedly realizing the fact that such remarks could raise questions as to the intent of the Congress, stated:

> The Senator from Alabama [Denton] has spoken about religious activities as such and the circumscribing of those religious activities. I believe you can equally present this case as purely a matter of freedom of speech and freedom of assembly. Religion might be a secondary consideration. . . . *Id.* at S8337 (daily ed. June 27, 1984).

Senator Hatfield then cited several cases "where a very narrow interpretation of the Constitution has, in effect, impinged upon the freedom of speech of students." *Id.* One of the cases cited by Hatfield and by other senators during other times in the debate is a case which is likely the primary moving force behind the Equal Access Act, *Lubbock Civil Liberties Union (LCLU) v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

Although described by Senator Hatfield and others as an "equal access" case, an examination of the history of the case shows that the "equal access" aspect of the case was but the last resort by the school district in its attempt to bring prayer into the schools—much in the

same way as the Congress has attempted to bring prayer to the schools through the Equal Access Act. Initially, the district had a practice of reading prayers over loudspeakers, allowing silent prayers in the classroom, holding Bible readings in school and allowing distribution of Gideon Bibles to students. A court challenge filed by the L.C.L.U. motivated the district to alter its religious practices. Then the district adopted a policy which permitted supervised voluntary meetings of student groups before and after school hours for any "education, moral, religious or ethical purposes." The Fifth Circuit held the new policy to be unconstitutional because the primary purpose of the policy was religious and its primary effect was to advance religion.

Also belying the argument that the Act's intent is primarily to protect free speech rights, is the discussion of the other types of groups which would be permitted to meet under an equal access policy. Senator Gorton asked Senator Hatfield, the floor manager of the bill, about the status of gay rights activist school organizations in the limited open forum. Hatfield expressed reservations as to whether the bill requires a school to allow such an organization on school premises. The colloquy continued as follows:

> Mr. Gorton. I gather the summary of what the Senator has said is that the creation of a limited open forum does not require that student organizations be permitted for any speech purpose whatsoever; that at least with the perfecting amendment of Senator Danforth, if the school finds that the prohibition of an organization is necessary or advisable to maintain order and discipline on school premises, they can prohibit the formation of a student organization in spite of the limited open forum, even though that student organization is only going to engage in talk and not in any form of action or physical disruption whatsoever.
>
> Mr. Hatfield. The answer to the Senator's question is "yes," but I come back to the basic purpose and the reason we have this whole matter coming

> up in the Senate is for none of those issues but, rather, the simple proposition that schools today are increasingly limiting in the area of free speech. 130 Cong. Rec. S8344 (daily ed. June 27, 1984).

What Senator Hatfield apparently meant was that he wanted equal access, free speech rights, for religious groups, but not necessarily for pay rights groups or other groups which the senator believes are properly excluded from the schools.

A review of the entire debate makes clear that the overwhelming vote in favor of the bill was because the voters back home want prayer in the schools, not because the members and the senators wanted to protect free speech rights. In the words of Congressman Ackerman:

> But to paraphrase the words of the very perceptive child who refused to eat his sugar-coated vegetables, this bill looks like school prayer, it tastes like school prayer, and it smells like school prayer. 130 Cong. Rec. H7733 (daily ed. July 25, 1984).

Amicus submits that the Congress could pass a constitutional Equal Access Act, but, like the legislature in *Wallace v. Jaffree*, the Congress' intent in this case changed the color of the Act. The Equal Access Act is but establishment of religion in free speech clothing.

B. If the Court of Appeals' Interpretation of "Noncurriculum Related" Is Correct, the Act Has the Primary Effect of Advancing Religion.

The court of appeals determined that some of the clubs in question are "noncurriculum related" and, therefore, the school district operates a "limited open forum" and all clubs, including religious clubs, must be allowed to meet. As discussed below, *Amicus* submits that the court erred in its interpretation of the Act. However, if it is held that the court's broad interpretation of "noncurriculum related" is correct, then the Act goes beyond the parameters of the first amendment's free speech clause, and instead, becomes an affirmative obligation on school districts to allow religious groups to meet on their campuses. Such an interpretation renders the Act unconstitutional because it would have the primary effect of advancing religion.

This Court has not been mechanical in following the *Lemon* three-prong standard in all establishment of religion cases. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). However, *Lemon* has been the standard in cases involving elementary and secondary age students.

> We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic. *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985).

If this Court determines that the Act passes the first prong of the *Lemon* test, the next question is whether a school's compliance with the Act as regards religious meetings necessarily has a primary effect of establishing religion.

Amicus submits that it does not as long as "noncurriculum related" is read narrowly. If the district operates a "limited open forum" in the sense of this Court's decisions under the Constitution, *e.g., Widmar v. Vincent*; *Perry Educ. Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37 (1983) (assuming those facts are possible in the context of a secondary school), there is very little possibility that students will perceive a religious club in that forum as school sponsored. But with facts such as those at bar, no inference other than that the school is sponsoring religion could be drawn.

Under the court of appeal's broad interpretation, clubs that have traditionally—traditionally, across the country, not only in this school district—been considered to be part of the educational program of the school will become part of the same category as the religious club. In other words, religious clubs will appear to have the same status

as clubs that formerly were sponsored by the school, whose activities were formerly directed by school employees. Whether one agrees or not that secondary school students are more "impressionable" than their university-age counterparts, given facts such as these, it would be understandable that both students and adults could perceive that the religious club had become part of the school's educational program.

Just as the presence of a public school teacher in a private school during the school day creates the perception of state advancement of religion, *Aguilar v. Felton*, 473 U.S. 402 (1985), the presence of a religious club in a public school has a similar effect when the clubs have traditionally been school-sponsored.

This case does not involve a university where clubs are allowed to meet in various places across the campus with little or no presence, much less involvement, of school personnel. This case involves one secondary school with one campus where traditionally only school sponsored, education related clubs have been allowed to meet after school under the direction of the school administration. Suddenly a religious club appears in that forum. How does the school overcome the perception that the clubs continue to be school sponsored, rather than merely "student initiated"? How does the school avoid the impression that the religious club is sponsored in the same manner as the school has sponsored the other clubs?

Thus, the primary effect of the circuit court's broad interpretation of "noncurriculum related" is nothing less than to advance religion. Under the Eighth Circuit's view, if a school allows student groups that do not have a direct connection to an academic subject, it has created a limited open forum and would not be allowed to differentiate between those clubs which support its educational mission and those which do not. If the school has traditionally sponsored nonacademic clubs, the perception of sponsorship would likely remain, and for all appearances, the religious club would be sponsored as well.

For example, in the present case if the circuit court's conclusion that Westside's chess club is noncurriculum related is accepted, the school must allow the religious student group to meet in the "limited open forum" under the Equal Access Act. The religious club would then meet during noninstructional time on school grounds on the same basis as Westside's thirty other groups and clubs which have been accepted by school officials as satisfying the goals and requirements of the school board policy on student groups. The board policy regards student clubs and organizations as "a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." The policy requires that school-sponsored groups have a faculty sponsor and that the superintendent establish operational guidelines for clubs and organizations. The policy does not cover the formation of clubs, but in practice students wishing to form a club present their proposal to school officials who must then decide whether the club would comport with board policy. To allow a religious student group to meet in such a context could do nothing but convey the impression that the school supports the religious group, a result at odds with the requirement that the state refrain from acts which have the effect of advancing religion.

III. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF "NONCURRICULUM RELATED."

If the Act is held to be constitutional, the question arises as to whether Petitioners violated the Act by refusing to allow Respondents to meet. The requirements of the Equal Access Act attach only when the school district is operating a "limited open forum," by granting an "opportunity for one or more 'noncurriculum related' student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The term "meeting" is defined as "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." *Id.* at § 4072(3).

Although the legislation is far from clear in this regard, it appears that the section which defines "meeting" does not limit school district discretion to designate what is a curriculum related *group*. Instead the definition refers to the *meetings* held by noncurriculum related groups. Thus, the activities of the student groups need not be *directly* related to a particular course.

Since the Act does not define "noncurriculum related," the legislative history must be consulted, bearing in mind Justice Scalia's admonition regarding the use of legislative history to determine intent. *Blanchard v. Bergeron*, 109 S. Ct. 939, 945 (1989). A look at the debate in both houses provides some insight on the issue. For example, during House debate Mr. Goodling, in a colloquy with himself stated:

> If we had had the time, for a further colloquy, Mr. Bonker was going to ask me the following question: One of the terms in the equal access amendment which needs clarification is "noncurriculum related student groups," which would trigger the equal access policy of this legislation. I would like to ask the gentleman from Pennsylvania [Mr. Goodling], as a former teacher and school administrator and principal cosponsor of the legislation how he would define "noncurriculum related student groups" for purpose of this measure.
>
> In answer to that question, I would say as follows: I would interpret "noncurriculum related" to encompass those student activities which are either of a type which schools usually do not sponsor or those activities which the school might sponsor but has not. Thus, there woud be a two-step inquiry to determine whether a meeting is noncurriculum related.
>
> First, is the subject matter of the meeting of a type, which a public school could sponsor? In other words, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category. A young Democrat or Republican club, private social organizations, or religious

> groups would not be of the type which a school could sponsor.
>
> Second, does the school or a school-teacher require or directly encourage student participation in such group in connection with curriculum course work?
>
> If both elements of this two-part analysis are satisfied, the meeting would be considered curriculum related and the equal access policy would not be triggered. 130 Cong. Rec. H7782 (daily ed. July 25, 1984).

In the Senate, the colloquy between Senator Gorton and Senator Hatfield indicates that the Senate, too, intended to leave the discretion on sponsorship of clubs to the school.

> Senator Gorton: Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related?
>
> Mr. Hatfield: We in no way seek to limit that discretion. 130 Cong. Rec. S8342 (daily ed. June 27, 1984).

The court of appeals in this case cited a colloquy between Senators Gorton and Hatfield wherein Gorton suggested that a chess club would be noncurriculum related so that "If the school permits a chess club, it has thereby created the limited open forum which brings into effect the proscriptions of the act." *Id.* Senator Hatfield agreed. However, the colloquy is inconsistent on the question of chess clubs, because Senator Gorton (a clever cross examiner who ultimately voted against the bill) later asked Senator Hatfield, in the context of their discussion about school district discretion, "Could the school make the same determination [of relatedness to the curriculum] with reference to a chess club?" Hatfield answered: "I would not say that no school district could but I cannot readily conceive of a criterion that could be used at this time to establish that as a curriculum-related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another." *Id.*

At the least it would appear that the legislative history indicates that school districts should have broad discretion in determining what is curriculum related. At the most, the legislative history shows that the members did not define the term and left it to the courts to fashion an appropriate standard.

But a judicially formulated standard is entirely different from courts deciding, on a club-by-club basis that French is curriculum related but chess is not. The court's duty is to decide, based on some general standard, such as relationship to a "reasonable pedagogical goal," whether or not the district's action was arbitrary. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988). The circuit court provided no standard in this case for its conclusion that the chess club and others which the court declined to name were noncurriculum related.

The Eighth Circuit based its determination that Westside High School is subject to the Equal Access Act and therefore must allow the student religious group to meet simply on its own assessment of whether any of the ten student clubs listed in Stipulation #17 of the Pretrial Order are curriculum-related. These groups include: Interact, Zonta, Welcome to Westside, Chess, Subsurfers, National Honor Society, Photography, Future Business Leaders of America, Student Advisory Board and Student Forum. Unlike the district court, the court of appeals did not accept the testimony of school officials that each of these student activities is related to the curriculum of Westside. Rather the Eighth Circuit believed that the school administrators characterized these clubs as curriculum-related in an "arbitrary" fashion as a means of circumventing the requirements of the Equal Access Act and denying the student religious group access to its facilities.

The appeals court "explained" its conclusion that WHS operates a limited forum with only one example. The court believed that the Chess Club is in fact not curriculum-related, because Westside offers no course in logic that would correspond with the asserted purpose of

strengthening logic and reasoning skills. (Whether Westside does in fact offer a course in logic is unclear since the district court mentions testimony that the Chess Club is an extension of Westside High School logic class.) The Eighth Circuit supported its view of the Chess Club with statements by members of Congress regarding whether a chess club would be considered curriculum-related under the Equal Access Act. *See* discussion, *supra* at 15. By this highly selective use of remarks appearing in the Act's legislative history, the court suggested that Congress had determined that a chess club could never be considered curriculum-related for Equal Access Act purposes. This is misleading since, as noted above, Senator Hatfield admitted that his conclusion about the curriculum relatedness of a chess club was based on his own inability to perceive a relationship, but that a school district had full discretion to reach the opposite conclusion. The court also stated that other unspecified groups at Westside are not related to the curriculum but failed to offer any justifications for this conclusion.

Ignoring Hatfield's comment that the Equal Access Act does not alter the full discretion of school districts, the Eighth Circuit regarded the school officials' testimony that each of the listed clubs is curriculum-related as mere "administrative decree" meant to exclude certain "unfavored" clubs. The appeals court suggested that the school officials' justifications were somehow dishonest or contrived as a means of frustrating the purposes of the Equal Access Act. In reality the testimony of the Westside officials comports with the views expressed by educators knowledgeable about student activities that these groups play an important role in the total learning experience offered by public schools and that they are regarded by some as an integral part of a school's curriculum.

> "Student Activities" have been called by many names over the years, and while the definition of "curriculum" historically has caused much debate, the appropriate title recognizing student activities lacks universal acceptance. The term "extracurricular ac-

tivities," an old term, gives the impression that they are outside the curriculum, but, as we enter the 1990's, student activities are recognized as a major part of the total school program.

The "Third Curriculum"—first termed by Robert W. Frederick—seems to be the best title, as it infers two additional curricula. The first is the coursework required to earn a high school diploma. The second curriculum allows for student choice, exploration, and specialization that include the electives that our students study to prepare for post-secondary study or work. Student activities represent a wide variety of school-sponsored teams, clubs, and organizations. Research reveals that it is in these activities that students learn most of the carry-over skills for adult life. While participating in student activities, our young adults learn critical lessons in leadership, followership, character, communications, teamwork, decision-making, self-worth, and individual potential. It is this level of learning that is called the Third Curriculum. Statement of Dale D. Hawley in Foreword to Biernat, N. and Klesse, E., *Student Activities* v (National Association of Secondary School Principals (NASSP) 1989).

Cocurricular activities vary from school to school. They are determined more by tradition, expectations, and policies of local schools and their respective publics than by written educational philosophies. Change, flexibility, and adaptability characterize the cocurricular component of the educational program perhaps more than the more traditional classroom component of American education.

Since the early 1900's schools have modified and expanded their programs of studies so that what was once considered extracurricular is now incorporated into the curriculum. Today it is common for schools to offer band, chorus, student publications, drama, and physical education-related experiences for credit. Furthermore, it is not uncommon for students to earn credits toward graduation for away-from-school work experience, school or community service, educational tours, leadership training activities, and cultural-

language studies abroad. Gholson, R. and Buser, R., *Cocurricular Activity Programs in Secondary Schools* v (NASSP 1983).

> [T]hose of us committed to student activities programs . . . know that the learning experience must go beyond the classroom to the space where the student council convenes, to the cheerleading camp, to the speech tournament, to the dark room frequented by the photography club, and the crowded chamber where the school newspaper is carefully edited. Statement of Terence J. Giroux in Christensen, D., *Managing School Activities* v (NASSP 1984).

These statements reinforce the idea well-accepted by many courts, including this Court, that decisions relating to curriculum matters are best left to local policymakers and administrators precisely because educational theories, philosophies, methodologies and goals are not rigid and static concepts susceptible to narrow judicial delineations. For example, Westside asserted that the Student Advisory Board and Student Forum constituted its form of student government which is generally related to teaching democracy and citizenship and to reinforcing a government course. These educational goals have been recognized as part of the learning experience associated with student councils, along with development of skills such as communication, leadership, goal identification, decision-making, planning and organization, implementation of ideas, problem solving and evaluation. *See* Ferguson, J., *Student Council Projects* v, 75 (NASSP 1982). Schools may seek to encourage the learning of such skills through different forms of student government. As explained by Ferguson in another publication, *Student Council Activity Resource Book* 1 (NASSP 1980):

> When America's schools were established one of their goals was to provide for the continuation of democracy. The student council was established to further that objective. If students are involved in making decisions which affect them, they will learn how the democratic process functions.

> Learning to make decisions is an important part of young people's development. Accepting the consequences of decisions is equally important. As students mature they must be given more responsibility and more involvement in making decisions which affect their lives.

Other schools have made leadership training, a "formal" course offering many of the same educational goals as those associated with student councils that are not classified as "courses" or "classes." *See* NASSP, *Developing a Student Leadership Class* (1977). In *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), the school district sponsored a student assembly for the purpose of student government nomination speeches. This Court agreed with the school that the assembly was related to the educational mission of the school and not a "limited open forum." While no court would likely find an elective course in leadership training to be unrelated to the curriculum, under the court of appeals reasoning, it is possible that a court could find student government activities to be noncurriculum related even though the school's purpose for allowing a student council is to foster the development of the same life skills taught within the confines of a "class" in leadership. Such a result would clearly illustrate the wisdom of judicial deference to local school boards and administrators in making educational determinations.

Such deference would likewise be appropriate were a school to view its chapter of the National Honor Society as curriculum-related. The society was created in 1921 to encourage academic achievement while developing other characteristics essential to citizenship in a democracy, including character, service and leadership. *See* NASSP, *National Honor Society Handbook* 1 (1984). This Court itself has recognized that promoting the development of students as citizens and members of society is one of the most important functions of our educational system. *E.g., Bethel School District v. Fraser.* However, under the Eighth Circuit's approach, a court could determine that activities meant to inculcate such values are not curriculum-related based on its own view that the educational goals are too "broadly" defined.

One wonders how the circuit court in this case could make this determination about the WHS clubs given the fact that the school has chosen not merely to allow students to meet, but to sponsor each of the activities. The Eighth Circuit, however, totally omitted any discussion of the relevance of school sponsorship to the issue of curriculum relatedness. However, the sponsorship factor must be considered, because if the court of appeals is correct, the school will be forced under the Act, not only to allow the religious club to meet but also to cease its sponsorship of the other groups which are found by the court to be "noncurriculum related."

Section 802(c) of the Act provides:

> Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school *uniformly* [emphasis supplied] provides that—. . .
>
> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees. 20 U.S.C. § 4071(c).

The term "sponsorship" is defined in section 803(2) of the Act.

> The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting. *Id.* at § 4072 (2).

Of course the reason these two provisions are in the law is to avoid school-sponsorship of a religious club which would constitute establishment of religion. But, would a school violate the Act by sponsoring some noncurriculum related clubs and not sponsoring others. Although such a requirement seems nonsensical, it appears from the legislative history that Congress, in order to

assure that schools not sponsor religious clubs, has in the process also prohibited sponsoring of any other club deemed to be "noncurriculum related." In the colloquy between Senators Hatfield and Gorton, Senator Hatfield explains that "Sponsorship is forbidden, very tightly controlled, according to our lawyer's counsel." Senator Gorton then asks: "I understand and I appreciate that, Madam President. I think it would be very good to tighten control. But those strictures will apply to all noncurriculum related student activities which may use the open forum?" Senator Hatfield answered "That is correct." This part of the colloquy goes on at some length making it very clear that the intent was to control all "noncurriculum related" clubs. Finally Senator Gorton states: "So the question is whether it is curriculum related. If it is not curriculum related, the Senator's amendment is providing controls over the faculty and administration personnel considerably greater than are many school districts in the United States today, is it not?" Senator Hatfield's answer: "That is true." 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984).

Therefore, the question of whether a particular club is "noncurriculum related" or not has an importance beyond whether a particular club must be allowed to meet on campus. The answer to that question will also determine whether the school and its employees can actively participate in the club or must merely stand by silently.

This Court has ruled on numerous occasions that it is not the province of the courts to make educational decisions. *E.g., Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562; *Bethel School District v. Fraser*, 106 S. Ct. 3169; *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Even in the university context where it has been held that the university cannot deny access based solely on its disagreement with the viewpoint expressed, it "legitimately may regard some subjects as more relevant to its educational mission than others." *Widmar*, 454 U.S. at 280.

The appeals court may not agree that chess is reasonably related to teaching of math, but that is not sufficient reason to overturn the school's curriculum decision. Courts should not substitute their own judgment for the judgment of school officials. *See, e.g., Wood v. Strickland*, 420 U.S. 308 (1973), holding that it is not the province of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion; *Board of Education of Rogers, Ark. v. McCluskey*, 458 U.S. 966 (1982), reversing the lower court holding that the school board unreasonably interpreted a rule against consuming alcoholic beverages; and *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that courts, in assuring that the requirements of the Education for All Handicapped Children Act are met, must take care to avoid imposing their view of preferable educational methods upon states.

A passage in *Garnett v. Renton School Dist No. 403*, 874 F.2d 608 (9th Cir. 1989), is worth noting on this point. That case was originally decided on January 17, 1989, *Garnett v. Renton School Dist No. 403*, 865 F.2d 1121 (9th Cir. 1989), the court holding, *inter alia*, that refusing to allow a religious club to meet under the circumstances of that case did not violate the Equal Access Act. After the court of appeals rendered its decision in the case at bar, the Ninth Circuit amended its earlier ruling to add a discussion on the issue of whether the district operates a "limited open forum." Whereas the earlier opinion merely affirmed the district court's factual finding that the activities "are supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related,'" *Id.* at 1127 (quoting district court, 675 F. Supp. 1268, 1274 (W.D. Wash. 1987)), the amended opinion expands on the role of the court in determining curriculum relatedness.

> [W]e respect the district's determination about which activities are curriculum related. Complete de novo review of every school district decision as to what is and what is not curriculum related would invite litigation from every student group denied a classroom for one reason or another, and is not necessary to effectuate the goals of the Act. Courts have always afforded school districts broad discretion in the management of school affairs, limited, of course, by any applicable constitutional or statutory principles. (Citations omitted.) The Equal Access Act does not expressly depart from this principle of deference to the judgment of local school officials. Congress must, therefore, be understood to have legislated in light of this principle. The legislative history supports this interpretation. 874 F.2d at 613-14.

As noted in *Garnett*, courts should not accept without question a final determination of the school district that it does not operate a limited open forum. They must examine the actions of the district, not just their words. In *Garnett* all activities were supervised by faculty and were "so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related.'" In the case at bar every club had an active faculty sponsor who was paid extra compensation for such duties. Petition for cert. at 4. The school district provided ample evidence of the relationship of each club to the curriculum. *Id.* at 8-10. The court of appeals apparently does not accept the educational judgment that chess is related to mathematics and, therefore, substituted its own educational judgment for that of the school district.

The court of appeals also implied that Subsurfers, a scuba club, is not curriculum-related. Whether or not one agrees that sports and physical education are an important part of the curriculum, nevertheless, such activities are a part of most curricula in schools across the country. Furthermore, the legislative history makes clear that sports were considered by the Congress to be curriculum

related. House sponsor Goodling stated during debate: "[T]he meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category." 130 Cong. Rec. H7732 (daily ed. July 25, 1984). Scuba diving is as much a sport as soccer, and school sponsorship of a diving club is perhaps even more important than of a soccer club because of safety considerations.

While *Amicus* does not suggest that every student activity could be arbitrarily classified as "curriculum-related" for purposes of the Equal Access Act, it does urge this Court to recognize that what is considered part of a school's curriculum may with good reason vary among school leaders and educators, from place to place and over time. Such determinations certainly should not reside with the courts.

IV. PETITIONERS' REFUSAL TO ALLOW RESPONDENTS TO MEET DOES NOT VIOLATE THEIR FREE SPEECH RIGHTS.

Since the Act is allegedly an attempt at codifying the free speech clause of the Constitution and this Court's decision in *Widmar v. Vincent*, the facts in that case should be compared with the facts in the case at bar, with the crucial question being whether Petitioners are operating a "limited open forum" under this Court's constitutional standards.

In *Widmar* the university had a written policy expressly allowing every student group to meet *except* religious groups. Over 100 groups were allowed to meet and apparently none of those groups were sponsored by the university. Arguably, in a very large high school with a diverse student body as many as 100 student organized and operated clubs could be present on campus. In that context it is unlikely that the students would perceive state sponsorship of a religious club in absence of a history of school sponsorship of other religious activities. But this situation will not, of course, exist on every high school campus. So, like other free speech issues, each case should be determined on its own merits.

In the *Widmar* case, if the university had a history of sponsoring religious activities similar to that of the Lubbock School District, the decision might have been different. The decision might also have been different had the school involved its faculty in the groups to the extent that Petitioners have done in this case. Nothing in *Widmar* indicates that the university could not have limited its forum to student groups which are sponsored by the school and directed by faculty. But, given the hands off policy of the university and the large number of secular clubs, the forum was limited only to the extent that only students could participate. Given those facts, refusing to allow religious clubs to meet violated the students' free speech rights. A similar situation at the secondary level could arguably produce a similar result.

However, the facts in the case at bar do not even remotely resemble those of *Widmar*. Furthermore, it is unlikely that such facts would ever be duplicated in a high school situation.

> The educational mission of a high school, in contrast [to the university], is more circumscribed. The curriculum consists less, and indeed is less conducive to, of an unfettered inquiry. As a secondary school, emphasis is placed more on a structured program "'for inculcating fundamental values necessary to the maintenance of a democratic political system.'" (Citations omitted) . . .
>
> Because of the inherent nature of a secondary school, any forum, created has purposes which are narrower, and uses more exclusive than a forum such as in *Widmar* or one open generally to all forms of communication by the public. In determining the type of forum, if any, created by secondary school authorities such as the Williamsport Area School District, therefore, we must take into account, among other things, the level of maturity of the students and the nature of the academic program involved. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 548 (3d Cir. 1984).

A school district does not create a "limited open forum" accidently. In absence of some action by the school, the school is presumed during the school day to be a closed forum—open only to officially sanctioned and sponsored educational activities. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985).

Although some activities may be more closely related to the actual curriculum than others, that fact does not make them non-educational. For example, the Ninth Circuit Court of Appeals in the case of *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356 (9th Cir. 1985), held that the school had created a public forum by allowing students to make campaign speeches for fellow student candidates during a student assembly called for that purpose. "To their credit, Bethel High School officials created an open forum for students to express their political views; when they did so they implicated the fundamental right of participation in the process of self-government, albeit a student government." *Id.* at 1365. The Supreme Court reversed. Justice Brennan, in a concurrence, noted that the school district's authority over the student's speech was limited to the "school environment." The key in that case was the fact that the assembly was school *sponsored*. Although it was not part of the curriculum itself, the assembly was sponsored by the school.

This Court also overturned a lower court ruling in *Hazelwood School District v. Kuhlmeier* holding that a school newspaper was a public forum. Citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the Court ruled that the evidence did not "demonstrate the 'clear intent to create a public forum,' that existed in cases in which we found public forums to have been created [citations omitted.]" 108 S. Ct. at 569. The *Hazelwood* Court ruled that student activities "may

fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 570. The Court further stated, "[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker* —is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.* at 562.

Similarly, in the case at bar all the clubs at issue are related to the education mission of the school, sponsored by the school and directed by faculty and, therefore, are not part of an open forum.

The *Widmar* standard does not apply until it is clear that the school has established an open forum. Since the school in this case is actively sponsoring all of the student clubs, the forum remains closed and the school cannot be forced to allow non-sponsored student groups to meet on school premises during the school day. There is insufficient evidence in the record to support Respondents' contention that the school's sponsorship of the student activities is a sham designed to preclude the Respondent's club from meeting on school grounds. In absence of such evidence the school's determination to sponsor those groups, and only those groups, should stand.

Most, if not all, of the cases that have ruled that *Widmar* does not apply at the secondary level have done so on the basis of the impressionability of the students and the restrictive nature of the public school environment. The "impressionability" analysis is not particularly helpful in this context because the degree of impressionability will vary with the fact sitations. That, of course, is the major failing of the Equal Access Act—it attempts to place all schools and all students into neat little niches. It assumes that if the school allows one club which falls into some vague, but broad category of "noncurriculum related," that it is discriminating against

any other club that the school refuses to allow to meet. The Constitution does not allow such easy answers.

Because of the nature of the public school environment, which this Court has acknowledged on numerous occasions is nothing like that of the college or university, it is unlikely that the *Widmar* facts could be recreated in the context of public secondary schools. But, if they could, the impressionability argument would not be as forceful. Undoubtedly, high school students could differentiate between school sponsored and nonsponsored activities given the right facts. If a high school activities period could be found that paralleled the student activities policy in *Widmar*, it is unlikely that students in that situation would have the impression that the school is sponsoring all the clubs.

However, where the school sponsors all the clubs, all the clubs have an educational basis, all the clubs meet during the school day in the same school where all the classes meet—all of which is true here—adults as well as students are likely to perceive state sponsorship of the religious club. Certainly, a hypothetical fact situation can be created in which dozens of student clubs meet on high school property, at the complete discretion of the students, with no school sponsorship or other direct involvement and few would disagree that to refuse a religious club to meet under those circumstances would be discriminatory. But, that is not the issue here because those facts are not present here.

Under the facts of this case, we do not need to address the question of whether allowing the religious club to meet would establish religion. That issue would only arise in a case paralleling *Widmar* where the failure to allow the group to meet would violate their free speech rights. Free speech rights are not implicated here because the school does not operate a limited open forum.

As noted above, if the court of appeal's definition of noncurriculum related stands, then compliance with the Act in this case would have the primary effect of ad-

vancing religion. But, given a reasonable definition which gives schools broad discretion to determine what is curriculum related, the Act would not have such an effect and Westside High School would not be required under the Act to allow the religious club—or any other non-curriculum related club—to meet.

CONCLUSION

Amicus submits first, that the Equal Access Act is facially unconstitutional because the Congress did not have a secular purpose in passing it. And, if the court of appeal's broad interpretation of the Act stands, the Act is unconstitutional because it has a primary effect of advancing religion. Second, *Amicus* submits that because Petitioners are not operating a "limited open forum" under either a Constitutional analysis or under the Equal Access Act, they are not violating either the free speech clause of the Constitution or the Act. For one or all of those reasons, *Amicus* submits that the court of appeals decision should be reversed.

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No. 88-1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et. al.*,

Petitioners,

—v.—

BRIDGET C. MERGENS, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH, THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, THE COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, AND AMERICANS FOR RELIGIOUS LIBERTY, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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Questions Presented

I. Whether the Equal Access Act and its application in the present case requiring Westside High School to recognize and sponsor a Christian prayer club violates the establishment clause of the first amendment.

II. Whether the Equal Access Act's mandate requiring public secondary schools to recognize and sponsor religious student speech as it would other speech is compelled by the free speech clause of the first amendment.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
CONSENT OF THE PARTIES	1
INTEREST OF AMICI CURIAE	1
INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. The Equal Access Act Violates the Establishment Clause of the First Amendment	4
A. Public Schools and the Establishment Clause: The *Lemon* Test	4
B. The Equal Access Act On Its Face and as Applied in This Case Violates All Three Prongs of the *Lemon* Test	4
1. The Purpose of the EAA and of the Christian Bible Club Meetings at Westside High School is Religious	4
a. The EAA's Religious Purpose	4
i. The Origins of the EAA	5
ii. The Language of the EAA	8
b. The Religious Purpose of the Student Meetings at Westside High School	9
2. The EAA Has the Primary Effect of Promoting Religion	10
a. Use of School Resources	10
b. The Imprimatur of Government	10

	PAGE
c. The Effect of School-Endorsed Prayer on Students	14
d. The Effect of the Christian Club at Westside: School Sanctioned Prayer	16
3. The EAA and its Application in this Case Fosters Unconstitutional Entanglement of Government and Religion	17
a. The EAA	17
b. The Application of the EAA in the Present Case Would Result In Excessive Entanglement Between Government and Religion	18
III. *Widmar* v. *Vincent* Does Not Apply to Public Secondary Schools	19
IV. The Court of Appeals Erred in Deferring to Congress' Fact-Finding on a Matter of Constitutional Law	23
V. Westside is Not Compelled by the Free Speech Clause of the First Amendment To Sponsor the Christian Bible Club	24
A. The Free Speech Clause Does Not Require the Public Schools to Sponsor Religious Expression	24
B. Westside's Sponsorship of a Christian Club Would Constitute Government Speech and Would Promote a Religious Viewpoint	25
C. Non-Recognition of the Christian Club Does Not Infringe Student Free Speech Rights	26
1. Equal Endorsement v. Equal Access	26
2. Respondents' Religious Expression	27

PAGE

3. The School Cannot Disclaim a Religious Endorsement 27

D. School Religious Clubs Undermine the Public School's Ability to Foster Democratic Values of Equality and Tolerance 27

CONCLUSION 29

APPENDIX A: Member Organizations of the National Jewish Community Relations Advisory Council A-1

APPENDIX B: Member Organizations of the National Coalition for Public Education and Religious Liberty . B-1

TABLE OF AUTHORITIES

PAGE

Cases

Abington School District v. *Schempp*, 374 U.S. 203 (1963) ..... *passim*

Aguilar v. *Felton*, 473 U.S. 402, 412 (1985) .. *passim*

Allegheny County v. *A.C.L.U.*, 109 S. Ct. 3086 (1989) ..... *passim*

Ambach v. *Norwick*, 441 U.S. 68 (1979) 27

Bd. of Educ. v. *Pico*, 457 U.S. 853 (1982).... 28

Bell v. *Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985) 12, 22

Bender v. *Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984) ..... *passim*

Bethel v. *Fraser*, 478 U.S. 679 (1986) 28

Brandon v. *Bd. of Ed.*, 635 F.2d 971 (2d Cir. 1980) ..... *passim*

Brown v. *Board of Ed.*, 347 U.S. 483 (1954).. 28

Cantwell v. *Connecticut*, 310 U.S. 296 (1940) . 10

Collins v. *Chandler*, 644 F.2d 759 (9th Cir. 1981)..... 18

Edwards v. *Aguillard*, 482 U.S. 578 (1987)... *passim*

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Hazelwood School Dist. v. *Kuhlmeier*, 484 U.S. ,108 S. Ct. 562 (1988) ..... *passim*

	PAGE
Knights of the KKK v. *East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978)	28
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978)	24
Larkin v. *Grendel's Den*, 459 U.S. 116 (1982)	12
Larson v. *Valente*, 456 U.S. 228 (1982)	15
Lemon v. *Kurtzman*, 403 U.S. 602 (1971)	*passim*
Lubbock Civil Liberties Union v. *Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982)	12, 18
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	5, 14, 19
Mary May v. *Vanderburgh*, 787 F.2d 1105 (7th Cir. 1986)	26
McCollum v. *Board of Education*, 333 U.S. 203 (1948)	*passim*
Nartowicz v. *Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984)	12, 22
Perry Education Ass'n. v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)	20
Perumal v. *Saddleback*, 243 Cal. Rptr. 545; *cert. denied*, 109 S. Ct. 327 (1988)	26
Sable Communications of California, Inc. v. *F.C.C.*, 109 S. Ct. 2829 (1989)	24
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	PAGE
Stone v. *Graham*, 449 U.S. 39 (1980)	5
Student Coalition for Peace v. *Lower Merion School*, 776 F.2d 431 (3d Cir. 1985)	6, 20
Tilton v. *Richardson*, 403 U.S. 672 (1971)	24
Tinker v. *Des Moines*, 393 U.S. 503	9, 26
Trietley v. *Board of Ed.*, 65 A.2d 1, 409 N.Y.S. 912 (1978)	18
United States v. *Carolene Products*, 304 U.S. 144 (1938)	23
Wallace v. *Jaffree*, 472 U.S. 38 (1985)	*passim*
Widmar v. *Vincent*, 454 U.S. 263 (1981)	*passim*
Constitutional Provisions and Statutes	
U.S. Const. Amend 1	*passim*
Equal Access Act, 20 U.S.C. §§4071 (Supp. V 1987)	*passim*
Legislative Materials	
Bills	
S.2782, 98th Cong., 1st Sess. (1984)	6
H.R.4996, *cited as revised* S.815, 98th Cong., 2d Sess. (1984)	6
S.2928, 97th Cong., 2d Sess. (1984)	5
S.J. Res. 212, 98th Cong., 1st Sess. (1984)	6
128 Cong. Rec. 11,719 (1982)	5
130 Cong. Rec. 93 (1984)	6
130 Cong. Rec. 2433 (1984)	6
130 Cong. Rec. 2678 (1984)	6

PAGE

Hearings

Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st. Sess. (1983) 6, 20

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S. Rep. No. 357, 98th Cong., 2d Sess. 1 *reprinted in* 1989 U.S. Code Cong., & Ad. News 2348 ..... 6, 20

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130 Cong. Rec. S.8330-8337, 8360-8361 (daily ed. June 27, 1984) 6, 7

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PAGE

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New York Times, Aug. 1, 1984 7

CONSENT OF THE PARTIES

All parties have consented to the filing of this brief and their joint letter of consent has been filed with the Clerk of the Court.

INTEREST OF AMICI CURIAE

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle that these goals and the general stability of our democracy are best served through the vigorous protection of the separation of church and state.

In support of this principle, the League has previously filed briefs in this Court as counsel and as a friend of the court in numerous cases dealing with the religious liberty clauses of the first amendment. *E.g., Allegheny County* v. *A.C.L.U.*, 109 S. Ct. 3086 (1989); *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Hobbie* v. *Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 (1987); *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); *Lynch* v. *Donnelly*, 465 U.S. 668 (1984); *Widmar* v. *Vincent*, 454 U.S. 263 (1981); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The League is able to bring to this appeal the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with 275,000 members dedicated to preserving the principles embodied in the Bill of Rights, including the separation of church and state. The ACLU has frequently appeared before this Court on church-state issues, both as direct counsel and as *amicus curiae*.

The National Coalition for Public Education and Religious Liberty is a coalition of individuals and organizations dedicated to a strong public school system which guarantees the religious liberty of all citizens. In support of these principles, the National Coalition for Public Education and Religious Liberty has intervened in many key establishment clause cases. *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *Aguilar* v.

Felton, 473 U.S. 402, 412 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985); and *Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). Members organizations of the National Coalition for Public Education and Religious Liberty participating in this brief are listed at appendix B.

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization including the following national organizations: B'nai B'rith, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America/National Women's League for Conservative Judaism, Women's American ORT as well as 117 community member agencies representing all major Jewish communities in the United States, listed in appendix A. As the national planning and coordinating body for the field of Jewish community relations, the NJCRAC believes that the separation of church and state in the public schools is an essential bulwark in maintaining the individual and political equality of all Americans.

This brief is also submitted on behalf of the Committee for Public Education and Religious Liberty (PEARL), a non-profit corporation consisting of organizational and individual members committed to the preservation of the dual principles of the separation of church and state and the free exercise of religion as they relate to education in the State of New York. To effectuate this purpose, PEARL has instituted suits and submitted briefs *amicus curiae* in numerous actions arising under the establishment clause, including *Aguilar* v. *Felton*, 473 U.S. 402 (1985); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973); and *Levitt* v. *Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).

Americans for Religious Liberty (ARL) is a non-profit, nationwide educational organization whose members represent the entire religious spectrum. ARL maintains that strict religious neutrality is required of our public schools by the first amendment. In support of this principle, ARL has filed briefs *amicus curiae* in numerous establishment clause cases. *E.g.*, *Edwards v. Aguillard*, 482 U.S. 578 (1987).

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

In enacting the Equal Access Act ("EAA") Congress expressly rejected this Court's interpretations of both the free speech and the establishment clauses of the first amendment. This Court has long held that the establishment clause prohibits school-sponsored religious activities in the public schools. In addition, this Court has recognized that the free speech clause permits limitations on those forms of student expression which implicate the voice of government. The EAA rejects these fundamental principles of first amendment jurisprudence.

The EAA seeks to equate school-sponsored prayer meetings with nonreligious school-sponsored activities. This legislative equation overlooks the establishment clause barrier against the use of the public schools to promote religion. The EAA permits, even requires, government to lend both material and symbolic support to religion, in blatant disregard for this Court's longstanding teachings under the establishment clause. An examination of the text and history of the EAA and its application to the prayer club involved in this case demonstrates that the EAA violates core establishment clause principles by providing government support to religion.

The EAA purports to extend the protection of the free speech clause to school sanctioned religious activities. Under the free speech clause, students in this case and in public schools across the country are free to meet to discuss religious issues and to pray. But the free speech clause does not require the public schools to place their imprimatur upon student religious meetings. By requiring our nation's public schools to endorse sectarian activities, the EAA, rather than fostering religious freedom, threatens individual rights of conscience.

ARGUMENT

I. The Equal Access Act Violates the Establishment Clause of the First Amendment.

A. Public Schools and the Establishment Clause: The *Lemon* Test

The establishment clause of the first amendment mandates that "Congress shall make no law respecting an establishment of religion." In *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), this Court developed a now longstanding tripartite analysis to determine the constitutionality of government involvement with religion under the establishment clause: the challenged practice must have a secular purpose, its effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion.[1] A government action violates the establishment clause if it fails any one of the three prongs. *Edwards* v. *Aguillard*, 482 U.S. 578 (1987).

The *Lemon* analysis was first articulated in a case involving government support for religion in education; and this Court has "relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Edwards*, 482 U.S. 578; *Grand Rapids* v. *Ball*, 473 U.S. 373 (1985); *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

B. The Equal Access Act On Its Face and as Applied in This Case Violates All Three Prongs of the *Lemon* Test

1. The Purpose of the EAA and of the Christian Bible Club Meetings at Westside High School is Religious

a. The EAA's Religious Purpose

When examining the constitutionality of a statute under the purpose prong of the *Lemon* test, this Court examines the legislation's "preeminent purpose." *Edwards*, 482 U.S. at

[1]This Court recently reaffirmed the continuing vitality of the *Lemon* test in *Allegheny* v. *ACLU*, 109 S. Ct. 3086 (1989).

590. In evaluating a statute requiring a religious display in the public schools, the Court concluded "Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose and is therefore unconstitutional." *Stone* v. *Graham*, 449 U.S. 39 (1980). Similarly, this Court struck down a legislative attempt to introduce prayer in the public schools, holding that the statutory provision for a moment of silence was enacted for "the sole purpose of expressing the State's endorsement of prayer. . . ." *Wallace*, 472 U.S. at 60. More recently, Louisiana's "Balanced Treatment Act" did not survive constitutional scrutiny because it lacked a secular purpose. Although the state legislature had articulated a secular purpose, Justice Brennan, writing for the Court, explained, "it is required that the statement of such purpose be sincere and not a sham." *Edwards*, 482 U.S. at 587.

As Justice O'Connor explained in her concurring opinion in *Lynch* v. *Donnelly*, 465 U.S. 688 (1984) "[t]he purpose prong of the *Lemon* test asks whether government's *actual* purpose is to endorse or disapprove of religion." 465 U.S. at 690, (emphasis added). To determine a statute's actual purpose, this Court has focused on the statute's legislative history. *See, e.g., Wallace*, 472 U.S. at 60. An examination of the language and the legislative history of the EAA demonstrates beyond any doubt that, notwithstanding its asserted goal of allowing all students "equal access" to school facilities, the actual purpose of the EAA is to promote sectarian religious activities in the public schools.

i. The Origins of the EAA

The EAA was the result of a two year effort, through a variety of legislative proposals and constitutional amendments, to circumvent this Court's school prayer decisions, *see, e.g., Engel* v. *Vitale*, 370 U.S. 421 (1962), and to promote religious activities in the public schools. The original equal access proposal was introduced in 1982. S.2928 specifically authorized meetings at the public schools for student religious groups. S.2928, 97th Cong., 2d Sess., 128 Cong. Rec. 11,719 (1982). This proposal gave way to two proposed constitutional amendments, the Hatch and Dixon Amendments, which also

sought to introduce prayer into the public schools.[2] When these efforts failed, they gave birth to several legislative initiatives. One of the bills, entitled the "Equal Access Act" provided that it would be unlawful for a school receiving federal financial assistance to deny "equal access . . . [to] students . . . that seek to engage in . . . activities that include prayer or religious speech on school premises. S.1059, S. Rep. No. 357, 98th Cong., 2d Sess. 1 *reprinted in* 1984 U.S. Code Cong. & Ad. News 2348. The Religious Speech Protection Act, the immediate precursor to the EAA, also expressly provided for student prayer meetings in the public schools.[3]

The religious purpose of the EAA manifested itself in the floor debates. In struggling to defend the EAA's deficiencies, Senator Hatfield, one of its leading proponents, essentially conceded that the "equal access" concept was an artifice to escape the establishment clause barrier to the use of the public schools to promote religion: "The Senator from Alabama has spoken about religious activities . . . I believe you can . . . present this case as . . . a matter of freedom of speech and freedom of assembly." *See* 130 Cong. Rec. S.8337 (daily ed. June 27, 1984). Thus the "equal access" concept was extended to protect "political, philosophical, or other" types of speech as a compromise measure to placate those members of Congress who "feared that protecting any religious speech would run afoul of the Establishment Clause." *Student Coalition for*

[2]S.J. Res. 212, 98th Cong., 1st. Sess. §2, 130 Cong.Rec. 93 (daily ed. Jan. 24, 1984); S. 2782, 98th Cong., 1st Sess., §§1-2, 130 Cong. Rec. 2678 (daily ed. Mar 4, 1984). In his statement before the Senate Committee on the Judiciary, Senator Denton explained that equal access measures were designed "to restore the constitutional right to pray in public schools and buildings." Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983).

[3]The Religious Speech Protection Act provided in part:

> It shall be a policy subject to the penalties in section 2 for a public secondary school receiving federal financial assistance which generally allows non-school sponsored groups of students to meet, not to discriminate on the basis of the religious content of the speech at such meetings.

H.R.4996, *cited as* revised S. 815, 98th Cong., 2d Sess., 130 Cong. Rec. 2433 (daily ed. Mar. 8, 1984).

Peace v. Lower Merion School, 776 F.2d 431, 439 (1985), *discussing* 130 Cong.Rec.8336-37 (remarks of Sen. Hatfield).

Senator Mattingly was even more direct: "The purpose of [the EAA] is, simply and straightforward [sic]—to allow students in public schools throughout this Nation to meet voluntarily during noninstructional periods for religious discussion, or Bible study, or prayer." *Id.* at 8360.[4] He did not conceal the EAA constituted a legislative maneuver to promote school prayer:

> Earlier this year the Senate debated for several weeks President Reagan's constitutional prayer amendment. Much to my regret, and I am sure to many of my colleagues in the Senate, President Reagan's amendment failed to receive the necessary two-thirds majority vote for passage.
>
> Following the vote I expressed my disappointment in the outcome of the prayer amendment. However, I also expressed my desire for the Senate to take the next step toward restoring . . . religion in the schools—which is to ensure that students are provided equal access to school facilities for voluntary religious activities.

Id. at 8361.[5]

To believe the EAA was actually intended to enhance student free speech rights, one would have to overlook the extensive history reflecting Congressional efforts to promote religion in the public schools. As reflected in this legislative history, the EAA "was not motivated by any clearly secular purpose." *Wallace*, 472 U.S. at 56. "[W]e need not be blind in this case to the legislature's preeminent religious purpose in

[4]The general perception of the religious purpose of the EAA is also captured in the media's reference to it as "the Son of School Prayer." *President Signs a Bill To Permit Prayer in Schools*, New York Times, Aug. 1, 1984, at A24, col. 1.

[5]For added analysis of the religious purpose of the EAA as reflected in its legislative history, see Teitel, *The Unconstitutionality of Equal Access Policies and Legislation Allowing Organized Student-Initiated Religious Activities in the Public High Schools*, 12 Hastings Const. L.Q. 529 (1985).

enacting this statute." *Edwards*, 482 U.S. at 590. The legislative history of the EAA reveals the statute lacks the constitutionally required secular purpose.

ii. The Language of the EAA

Although the EAA is ostensibly intended as a measure to protect all student speech equally, its very text reveals its impermissible religious purpose. The Act purports to protect the right of students to meet for discussions on all philosophical, political and religious subjects. Significantly, however, the majority of the EAA's provisions are devoted to circumventing the constitutional barriers to government sponsored religious activities in the public schools. In seeking to protect religious meetings, the EAA has the paradoxical effect of limiting, rather than enhancing, all other nonreligious student activities in the public schools.

For example, the EAA specifies that student meetings cannot be sponsored by the school, government, or its agents or employees. 20 U.S.C. §4071(c)(5). This statutory provision is irrelevant to a meeting of typical youth organizations such as the noncurricular clubs stipulated to this case.[6] No social, educational or constitutional propose is served by preventing the public schools from sponsoring, and even encouraging, student attendance at such meetings. To the contrary, the value of such clubs is only diminished by depriving them of school sponsorship.

The EAA goes on to require that for the purpose of creating a limited open forum, "nonschool persons may not direct, conduct, control or regularly attend the meetings." 20 U.S.C. §4071(c)(5). Once again, this provision is irrelevant, even counterproductive, to all student clubs other than sectarian religious groups. A 4-H club does not need the protection of the EAA to meet at school, but under the EAA, it could be prohibited from inviting a local farmer to lead a discussion on agricultural subjects. While purporting to protect students' rights of free expression, the EAA ironically limits the availability of information and means of expression in the schools by extending the constitutional prohibition against school support for religion to all student clubs.

[6]The noncurricular clubs at Westside include: the ski club, a chess club, a surfing club, and service clubs, such as Welcome to Westside, Zonta and Interact. J.A. 297-307.

The provisions of the EAA which specifically address religious activities conclusively demonstrate that its actual purpose is to promote religion, and not to broaden free expression in the public schools. Sections 4071(d)(1), (2) and (3) prohibit school officials from influencing the form of religious activity, requiring any person to participate in religious activity and expending public funds on student meetings. These provisions are material only to those student meetings which are religious and likely to conflict with this Court's longstanding decisions prohibiting the use of the public schools to promote religion. *See, e.g., Abington School District* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

School sponsored student meetings which are not religious in nature do not need the protection of the EAA. Further, individual religious student expression does not need the protection of the EAA. *See Tinker* v. *Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). Accordingly, it is specious to argue that the EAA's purpose is to protect student rights of free expression. The EAA's exclusive purpose is to protect school sponsored religious meetings.

By enacting the EAA, Congress provided statutory support to those religious faiths seeking governmental support for their worship and proselytizing efforts. The true purpose of the EAA is to eviscerate the constitutional mandate forbidding the use of the public schools to promote religion. "[W]hen the state enacts a law to serve a religious purpose. . . [its] governmental intention to promote religion is clear." *Edwards*, 482 U.S. at 585.

b. The Religious Purpose of the Student Meetings at Westside High School

Though respondents strain to characterize the Christian club as a component of the secular educational goals of Westside High School ("Westside"), the record clearly demonstrates that the club is devoted to essential Christian purposes.

Bridget Mergens conceded below that she organized the Bible club not only to engage in the quintessentially religious activities of prayer and fellowship, but also because she wanted to promote Christianity to non-religious students at Westside. J.A. 75. Prayer and proselytizing are religious activities. *See Engel* v. *Vitale*, 370 U.S. at 424; *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940).

Proselytizing is an important part of the Christian Bible club's activities. One club member explained that he attended the Bible club meetings not only because it allowed him to use Westside to further his development as a Christian, but because the club also enabled him to assist others to "become Christians." J.A. 185. Another club member similarly testified that the club fit in with her involvement in a program called "Evangelism Explosion," which is devoted to telling others about "Jesus Christ and how he has affected our life." Trial Transcript at 232. A Christian Bible club organized to engage in prayer and to attract converts serves an exclusively religious purpose.

2. The EAA Has the Primary Effect of Promoting Religion

a. Use of School Resources

Though this Court has not yet considered the constitutionality of school sponsored student worship in the public schools, similar religious practices have not withstood constitutional scrutiny. In *McCollum*, the Court held the establishment clause prohibits religious groups from taking advantage of the state's public school machinery to further their sectarian goals:

> The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. . . . This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment.

333 U.S. at 209-210. The establishment clause bars the state from "employ[ing] its facilities or funds in a way that gives any church, or all churches, greater strength in our society

than it would have by relying on its members alone." *Abington*, 374 U.S. at 229.

Westside conducts a club fair in its gym each year under the direction of the assistant principal at which clubs aggressively recruit new members. J.A. 422 *et. seq.* Requiring the school to allow respondents to exploit a school-sponsored fair conducted in the school's gymnasium to win converts clearly involves the "utilization of the tax-established and tax supported public school system to aid religious groups." *McCollum*, 333 U.S. at 210.

Though the EAA seeks to justify organized religious activities by characterizing prayer meetings and proselytizing as "student-initiated," the establishment clause proscription on the use of public school resources to promote religion in no way depends upon who initiates the religious activities. Under the establishment clause, it is immaterial whether students, teachers, or outsiders initiate the religious activities. *See* 12 Hast. Const. L. Q. 529, *supra* note 5. The religious activities held unconstitutional in *McCollum* originated with private individuals, not state officials, but the Court recognized that the exploitation of state resources for religious purposes and the accompanying appearance of government support for religion violated the establishment clause.

b. The Imprimatur of Government

The EAA not only sanctions the use of public school resources to advance religion, it also violates the establishment clause by requiring the public schools to place their imprimatur on religious activities. The EAA permits the students at Westside and at public secondary schools across the country to obtain their school's official sponsorship and recognition of sectarian clubs devoted to worship and proselytizing. 20 U.S.C. §4071(b). Conducting religious activities under the school's formal auspices and with school approval creates the impression that government endorses those sectarian practices or beliefs.

More than forty years ago, the Court recognized that the public school constitutes "the symbol of our democracy." *McCollum*, 333 U.S. at 231. In *Engel*, Justice Black wrote that activities which place the government's "official stamp of

approval" on religion represent "one of the greatest dangers to the freedom of the individual to worship in his own way." 370 U.S. at 429.

More recently, this Court explained in *Grand Rapids*:

> Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated.

473 U.S. at 389. In *Grand Rapids*, the Court concluded the challenged programs violated the establishment clause in several ways. Not only did they provide a government subsidy to religion, permitting state-funded religious indoctrination, but they also created the unconstitutional appearance of a "symbolic union of church and state." *Id.* at 397. The EAA provides for a similar union of church and state. When a public high school provides official sponsorship to sectarian activities, government becomes unconstitutionally allied with religion. *See Abington*, 374 U.S. at 224; *see also Larkin* v. *Grendel's Den*, 459 U.S. 116, 125-126 (1982).

Every federal appellate court to review the constitutionality of "equal access" religious activities in the public schools, with the sole exception of the court below, has held that such activities violate the establishment clause by placing the government's imprimatur on religion. *Garnett* v. *Renton Sch. Dist.*, 865 F.2d 1121 (9th Cir. 1989); *Bender* v. *Williamsport Area Sch. Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986); *Bell* v. *Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Nartowicz* v. *Clayton County Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984); *Lubbock Civil Liberties Union* v. *Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1159 (1983); *Brandon* v. *Bd. of Ed.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

In *Bender*, the Court of Appeals for the Third Circuit explained:

> Since it is the public schools which provide the most prolonged and involved contact which youth enjoy with the state, and indeed, for many, the public schools may appear as an institutional symbol of government in general, any practice which communicates sanction by the school of religious activity amounts to an Establishment Clause violation.

741 F.2d at 555. Most recently, the Ninth Circuit, addressing a nearly identical factual setting, held the use of high school facilities to conduct student prayer meetings impermissibly advances religion because the meetings are school recognized and thus enjoy school sponsorship. The circuit recognized the many distinctions between the setting of a public secondary school and the university setting presented in *Widmar* v. *Vincent*, 454 U.S. 269 (1981):

> Unlike university students, high school students are required to attend school. The instructional format at a high school is far more structured than at a university. . . . Teachers at high school, unlike college professors, are both educators and authority figures. The same considerations that mandate special vigilance in preventing religious establishments in public schools—the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals—distinguish public secondary schools from public universities. The religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus.

865 F.2d at 1125-1126. *See Lubbock*, 669 F.2d at 1045. ([A]llowing religious meetings at a time closely associated with the beginning or the end of the school day . . . carries with it the implicit approval by school officials. . . . This renders the primary effect of the policy impermissible advancement of religion).

To our nation's students, the public school is a symbol of government. *McCollum*, 333 U.S. at 231. This Court and the overwhelming majority of federal appellate courts have held that permitting organized religious activities in the public schools violates the establishment clause by conferring the government's imprimatur upon those sectarian activities. By requiring a school to recognize a school religious club when the school provides for even a single "non-curricular" club, 20 U.S.C. §4071(a), the EAA only exacerbates the impression of state sponsorship of religion. In a school at which there is only one other student club, and the school's sanction, therefore, is not diffused through a variety of student organizations, the EAA-required school promotion of a religious club underscores the appearance of unconstitutional government sponsorship of religion.

c. The Effect of School-Endorsed Prayer on Students

By requiring the public schools to endorse religious clubs, the EAA threatens the religious liberty of all those students who are not members of the endorsed religion. Justice O'Connor has articulated the rationale underlying the first amendment's mandate against government endorsement of religion:

> The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.

Wallace, 472 U.S. at 70. In her concurring opinion in *Lynch*, Justice O'Connor wrote:

> Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

465 U.S. at 669.

This Court recently reaffirmed the significance of this test in *Allegheny* v. *A.C.L.U.*, 109 S. Ct. 3086. Writing for the Court, Justice Blackmun defined the establishment clause inquiry in part as whether nonadherents are likely to perceive the challenged governmental action as a disapproval of their individual religious choices. *Id.* at 3101-3103. In his dissent, Justice Kennedy agreed the establishment clause proscribes an activity which "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.* at 3137.

When a public school endorses a sectarian student group, students will be influenced to adopt the school endorsed prayer club's beliefs to meet what they perceive to be the school's expectations. As the Court of Appeals for the Second Circuit observed in *Brandon*:

> An adolescent may perceive "voluntary" school prayer in a different light were he to see the captain of the schools football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a public school.

635 F.2d at 978. Justice Frankfurter expressed the same view in *McCollum*, "[t]he law of imitation operates, and nonconformity is not an outstanding characteristic of children." 333 U.S. at 227. The EAA only increases this pressure to conform by requiring schools to place their authority behind student religious clubs.

In enacting the EAA, Congress did more than pass unconstitutional legislation designed specifically to advance the religious needs of certain sectarian groups. *See Larson* v. *Valente*, 456 U.S. 228 (1982). The EAA also threatens the religious liberty of nonadherent students. In the public school context, students who choose not to participate in school sanctioned religious meetings become outsiders in their own community. These serious social consequences are especially problematic since secondary school students are compelled by law to attend school. The establishment clause prohibits the

government from diminishing anyone's stature in the community on the basis of their religious choices. *Allegheny*, 109 S. Ct. at 3102.

d. The Effect of the Christian Club at Westside: School Sanctioned Prayer

Though respondents freely engage in informal religious meetings at Westside, in the present action they expressly seek the school's formal endorsement of their sectarian activities through the school's official recognition and sponsorship of their club. J.A. 141, 428. Requiring official school sponsorship of the Christian Bible club would give rise to a blatant form of state sponsorship of religion.

Westside students testified they pray informally as a group and discuss religious matters without interference from school officials. J.A. 106, 136.[7] Dr. Findley, Westside's Principal, told the students they could meet informally at school for religious purposes. J.A. 428. Unsatisfied with such meetings, however, respondents now demand that the school place its formal sanction on their sectarian activities. J.A. 141, 428.

Under Westside's policy, every student club is officially sponsored by the school. J.A. 488. School Board Policy 5610, which governs Westside, provides, in pertinent part:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> *School-sponsored clubs and organizations are those directly under the control of the school administration, and shall have faculty sponsorship.* The Superintendent shall establish guidelines for clubs and organizations which shall function for the welfare and best interest of the students and the school.

[7]In addition, they meet for fellowship and prayer in each other's homes and at church. J.A. 140.

> Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race color, creed, sex or political belief.

Id. (emphasis added).

Dr. Findley testified that under this policy, the Christian club would involve school sponsorship. He explained: "We've always had a sponsor in charge of a club and . . . we've always encouraged kids' participation in clubs and activities. In fact . . . when I talk to parents I emphasize the importance of being involved." J.A. 425. A sectarian club at Westside would necessarily receive the official support of the school administration.

Respondents do not seek the right to engage in prayer; instead, they seek the school's endorsement of their sectarian activities. Nothing prevents the students at Westside from meeting on school premises or outside of school to pray. What the establishment clause forbids is the formal governmental sanction of these religious meetings. The first amendment "has never meant that a majority could use the machinery of the state to practice its beliefs." *Engel*, 374 U.S. at 226.

3. The EAA and its Application in this Case Fosters Unconstitutional Entanglement of Government and Religion

a. The EAA

When religious activities take place within the highly supervised context of a public school, the school inevitably becomes entangled with religion. In *Lemon*, the Court recognized the entanglement which flows from "putting the school in a position of governance over religious activity." 403 U.S. at 621-622. *Aguilar* v. *Felton*, 473 U.S. 402, 412 (1985).

The EAA provides for the "nonparticipatory" presence of public employees at student meetings. 20 U.S.C. §4071 (c)(3). The lower courts have consistently recognized that faculty supervision of student religious activities creates a

level of administrative entanglement with religion which renders school-supervised student worship unconstitutional. In *Garnett*, the Ninth Circuit said "the necessary supervision of student activities by teachers" makes it likely that government and religion will become excessively entangled. 865 F.2d at 1126. The Second Circuit has similarly concluded, "if the state must engage in continuing administrative supervision of nonsecular activity, church and state are excessively intertwined." *Brandon*, 635 F.2d at 979. *See also Bender*, 741 F.2d at 556-557; *Lubbock*, 669 F.2d at 1047; *Collins* v. *Chandler*, 644 F.2d 759 (9th Cir. 1981); *Trietley* v. *Board of Ed.*, 65 A.2d 1, 409 N.Y.S. 912 (1978).

Under the EAA, there is added unconstitutional entanglement because the schools must monitor student religious meetings to ensure they remain "student-initiated." 20 U.S.C. §4071(c)(1). Excessive entanglement inheres in the constant surveillance needed to guarantee that student participation in prayer meetings remains free of coercion. *Lubbock*, 669 F.2d at 1047.

b. The Application of the EAA in the Present Case Would Result In Excessive Entanglement Between Government and Religion

Pursuant to Westside's policy and practice, its student clubs are an integral part of the school's program. Policy 5610 requires that every student club have a faculty sponsor. J.A. 188. Such faculty supervision engenders entanglement between the school and religion. "[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." *Lemon*, 403 U.S. at 620-621.

The fundraising activities of student clubs at Westside present added entanglement concerns. J.A. 353, 357. School officials would have to engage in pervasive monitoring to ensure that the funds raised by the Christian club representing the school in the outside community are not employed for sectarian purposes. Such close government supervision of the daily activities of a religious organization "infringes precisely

those establishment clause values at the root of the prohibition of excessive entanglements." *Aguilar*, 473 U.S. at 412.

The constitutional prohibition against entanglements between government and religion arises from the historical concern over social divisiveness along religious lines. *Lemon*, 430 U.S. at 624.[8] The public schools symbolize our democracy, and "[i]n no activity of the state is it more vital to keep out divisive forces than in the schools." *McCollum*, 333 U.S. at 231. Justice Brennan expressed this concern eloquently in his concurring opinion in *Abington*:

> [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. . . .

374 U.S. at 241-242. School sponsorship of sectarian activities under the EAA fosters social divisiveness and undermines the welfare of our country's unparalled religious diversity.

III. *Widmar* v. *Vincent* Does Not Apply to Public Secondary Schools.

Widmar v. *Vincent*, 454 U.S. 263 (1981), held that the establishment clause did not prevent a religious group from meeting at the University of Missouri. The Court found that by making its facilities "generally available" to more than 100 student groups, the university had created a public forum.

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[8]While the Court appears to have limited its concern over the constitutional significance of societal divisiveness along religious lines to the context of cases involving direct financial aid to religion, *see Lynch*, 465 U.S. at 685, such parameters have not been articulated in the context of the public schools, which present unique divisiveness concerns. *See Abington*, 374 U.S. at 242; *McCollum*, 333 U.S. at 227 (Brennan J., concurring).

Absent a compelling state interest, the exclusion of a speaker from such a forum would violate the Constitution. 454 U.S. at 270.

The EAA seeks to apply *Widmar* to the context of public secondary schools.[9] In the present case, the court below simply accepted Congress' extension of *Widmar*. 867 F.2d at 1080. By extending *Widmar* beyond its facts, however, the EAA ignores essential constitutional distinctions between a public secondary school and a public university under both the establishment and free speech clauses. A comparison of the facts of the present case with those in *Widmar* illustrates the errors in extending *Widmar* to the vastly different setting of a public school.

In *Widmar*, the Court emphasized that the student meetings conducted on the campus of a state university did not involve the government's official stamp of approval: "First, an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274. While a public university may constitute a public forum, the campus of a public secondary school rarely if ever possesses these characteristics. *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. ___, 108 S. Ct. 562 (1988); *Perry Education Ass'n.* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983).

The University of Missouri had a policy of unrestricted access to campus facilities. 454 U.S. at 267. As this Court noted, that policy effectively disassociated the university from the message of any of the student groups which met on campus:

> [S]uch a policy "would no more commit the University . . . to religious goals" than it is "now committed to the goals of the Students for a Democratic Society, the Young Socialist Alliance," or any other group eligible to use its facilities.

[9]During Congressional hearings, Senator Hatfield stated: "This bill is a straightforward measure to apply the Supreme Court's decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) to public schools which receive federal aid." *Hearings on S.815 and S.1059 Before the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983)(prepared statement of Senator Hatfield). *See* S. Rep. No. 357, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. Code Cong. & Ad. News 2348, analyzed in *Stud. Coalition for Peace v. Lower Merion School*, 776 F.2d 431, 439. (3d Cir. 1985).

Id. at 274. Public secondary schools are considered to be public forums only if school officials have allowed them to become open to "indiscriminate use by the general public." *Hazelwood*, 108 S. Ct. at 569.

In contrast to the policy of the University of Missouri, which provided for indiscriminate access of student organizations, Westside's Policy 5610 excludes clubs which embrace discriminatory standards and those which are sponsored by any religious organization. J.A. 488. Further, Policy 5610 provides: "student clubs and organizations [are] *a vital part of the total education program* as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." *Id.* emphasis added. Pursuant to this policy, Westside has promoted various skills-training clubs such as chess and photography, service clubs, such as Interact and Zonta, and civic clubs, such as student government. The subject matter of these clubs reflects the special educational and civic goals of the public schools. *See Hazelwood*, 108 S. Ct. at 570. Since Westside clearly regulates the use of its facilities by students, the school does not constitute a public forum. *Id.* at 562.

Furthermore, the students in *Widmar* were not compelled by law to attend the University of Missouri. In contrast, attendance for high school students is mandated by state law. *Garnett*, 865 F.2d at 1125; *Bender*, 741 F.2d at 548. Obviously, the establishment clause prohibits government from transporting citizens to and from worship services at a government-owned and maintained facility at public expense. *See McCollum*, 333 U.S. at 209-210. The EAA, however, requires the public schools to provide exactly this support to students who wish to pray at Westside.

Westside also differs from a public university in that Policy 5610 requires the presence of a faculty sponsor at student meetings, thus placing the authority of government over student religious activities. The circuit courts have repeatedly noted the significance of this distinction. The Ninth Circuit

pointed out in *Garnett* that "the student groups allowed to meet in *Widmar*, . . . did not need supervision or monitoring by government employees. 865 F.2d at 1126. In *Bender*, the Third Circuit emphasized:

> [I]t is readily apparent that a school teacher or somebody associated with the school necessarily must impart the impression to students that the school's authority and the school's endorsement is implicated in the relevant activity. . . . Even a parent undertaking the role of monitor would necessarily be perceived as a school authority. It goes without saying that no such authority figure or government endorsement was part of the Widmar activity program. . . .

741 F.2d at 552-553. *See Little Axe*, 766 F.2d at 1405; *Nartowicz*, 736 F.2d at 648; *Lubbock*, 669 F.2d at 1047; *Brandon*, 635 F.2d at 978.

Most important, as this Court pointed out in *Widmar*:

> University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.

454 U.S. at 275 n. 14. The distinction drawn in *Widmar* reflects this Court's emphasis on the impressionability of public school students. In his concurring opinion in *Abington*, Justice Brennan noted that the difference in student ages "warrants a difference in constitutional results." 374 U.S. at 253. More recently this Court said in *Edwards*:

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and/or his or her family Students in such institutions are impressionable and their attendance is involuntary. . . . The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure.

482 U.S. at 584 (citations omitted).

The circuit courts also have consistently evidenced this concern. In *Lubbock*, the Fifth Circuit recognized that the "impressionability of secondary and primary age school children and the possibility that they would misapprehend the involvement of the [school]" in religious meetings rendered such activities unconstitutional. 669 F.2d at 1045. *See also Brandon*, 635 F.2d at 978 ("To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This inference is too dangerous to permit").

Widmar simply does not apply to the vastly different setting of a public high school. *See* Stone, *The Equal Access Controversy: The Religion Clauses and the Meaning of Neutrality*, 81 Nw.U.L. Rev. 168, 172 (1986). By attempting to extend Widmar beyond its facts, the EAA misstates the free speech principles underlying that decision, and contravenes the establishment clause by allowing sectarian student groups to use the public secondary schools to promote religion.

IV. The Court of Appeals Erred in Deferring to Congress' Fact-Finding on a Matter of Constitutional Law.

Without engaging in any independent judicial inquiry, the court below merely accepted Congress' extension of *Widmar* to the public schools. Ignoring the many distinctions between the limited government role in the public university in *Widmar* and the significant role of government at Westside, the court below focused solely on the differing age levels of the students, and summarily concluded, "Congress considered the difference in the maturity levels of secondary and university level students before passing the EAA. We accept Congress' factfinding." 867 F.2d at 1080.

By deferring to Congress' "fact-finding" and its interpretations of both the free speech and establishment clauses of the first amendment, the court of appeals departed from its responsibility to apply the principles of constitutional law developed by this Court. While deference to Congress may be appropriate in areas such as commercial regulation, *see United States* v. *Carolene Products*, 304 U.S. 144 n. 4 (1938),

this Court has rejected the proposition that the judiciary should accede to the legislature's interpretation of the Constitution: "To the extent that the government suggests that we should defer to Congress' conclusion about an issue of constitutional law, our answer is that while we do not ignore it, it is our task in the end to decide whether Congress has violated the Constitution." *Sable Communications of California, Inc.* v. *F.C.C.*, 109 S. Ct. 2829, 2838 (1989). *See also Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978), ("[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake").

A constitutional determination is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch*, 465 U.S. at 694 (O'Connor. J., concurring). The inquiry is a highly fact-sensitive one which emphasizes the specific context of the challenged government involvement with religion. *Allegheny*, 109 S. Ct. at 3102, 3103. In establishment clause cases involving educational settings, this Court has long recognized the constitutional distinctions presented by the divergent contexts of a university and a public school. *Compare Tilton* v. *Richardson*, 403 U.S. 672 (1971) *with Grand Rapids*, 473 U.S. 373. The court below erred in accepting without any judicial analysis Congress' "findings" concerning the EAA and its application to the setting of a public school.

V. Westside is Not Compelled by the Free Speech Clause of the First Amendment To Sponsor the Christian Bible Club.

A. The Free Speech Clause Does Not Require the Public Schools to Sponsor Religious Expression

In an effort to buttress their statutory claim, respondents attempt to cast this case in free speech terms. Yet as respondents readily concede, school officials have expressly permitted them to meet at the school. J.A. 450; 428. School officials have never attempted to dictate either the form or substance of their meetings. Respondents' only complaint, therefore, is that their meetings have not received the official imprimatur of school sponsorship that other clubs receive. What is at

stake in this case is whether or not respondents have a constitutional right to become the Westside High School Christian Bible Club.

Nothing in the first amendment guarantees that right. To the contrary, the use of the school's name in connection with an inherently religious activity would raise obvious and profound establishment clause problems. *See* Section I, *supra*. These constitutional problems are not vitiated by the Eighth Circuit's erroneous application of *Widmar*'s public forum analysis to this case. None of the student clubs at the University of Missouri were school sponsored; accordingly, *Widmar* is entirely silent on the question of school sponsorship of student clubs, the issue now before this Court. *Widmar* holds that a state university cannot selectively deny access to student groups wishing to meet for purposes of religious expression. Westside has provided such access in this case. Whether Westside created "a limited open forum" by sponsoring certain student clubs pursuant to school board policy is inapposite.

B. Westside's Sponsorship of a Christian Club Would Constitute Government Speech and Would Promote a Religious Viewpoint

This Court has affirmed there is no first amendment right to incorporate religious doctrine in the public school curriculum. *Smith* v. *Board of School Com'rs*, 827 F.2d 684 (11th Cir. 1987), *aff'd*, ___ U.S. ___ (1988). In regard to other school activities, this Court has recognized the distinction between the constitutional protection of student free speech rights and "whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood*, 108 S.Ct. at 569.[10] If the Hazelwood School District has discretion over the contents of its school newspaper in order to avoid the impression of official school sponsorship, given the express prohibition on religious endorsement contained in the establishment clause, Westside cannot be constitutionally compelled to sponsor a student Christian club.

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[10] *See generally* Yudof, *When Government Speaks: Toward a Theory of Government Expression and the First Amendment*, 57 Tex. L. Rev. 863 (1979).

In eschewing sponsorship of religious clubs, Westside maintains a policy of religious neutrality, and not hostility toward religion.[11] There is no basis for respondents' allegations that the school has discriminated against their particular religious viewpoint. Neither Westside's curriculum nor any of its clubs express any viewpoint whatsoever on religion. *Cf. Tinker* v. *Des Moines*, 393 U.S. 503 (1969).

C. Non-Recognition of the Christian Club Does Not Infringe Student Free Speech Rights

1. Equal Endorsement v. Equal Access

Respondents do not seek "equal access" to school facilities. Instead, they seek "equal status" to become the Westside High School Christian Club. *See* J.A. at 157, 244, 454. They want Westside to express their private sectarian messages as the school's message. While neither students nor teachers check their first amendment rights at the school house door, neither do they there obtain the right to commandeer the state's imprimatur and resources in support of their personal sectarian views. *See, e.g., Mary May* v. *Vanderburgh*, 787 F.2d 1105 (7th Cir. 1986). Such government endorsement has no analogue in the larger community. Stewart, *The First Amendment, the Public Schools and the Inculcation of Community Values*, 18 Journal of Law and Education 23, 28 (1989). In fact, the establishment clause forbids such governmental support for religious messages. There is a constitutional difference between a private religious club and a school sanctioned one. *See, e.g., Perumal* v. *Saddlebrook*, 243 Cal. Rptr. 545 (Cal. App. 4 Dist.), *cert. denied*, 109 S.Ct. 327 (1988). Respondents would blur that distinction. Respondents want to compel Westside to express their personal religious viewpoints as the message of the public school.

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[11] To suggest otherwise is to overrule longstanding court precedent mandating separation of church and state in the public schools. *See, e.g., Wallace*, 472 U.S. at 60. The principle of separation of church and state does not constitute hostility toward religion. *See Abington*, 374 U.S. at 215. *See also Smith* v. *Board of Commissioners*, 827 F.2d 684 (11th Cir. 1987).

2. Respondents' Religious Expression

Furthermore, the students are not deprived of the means of religious expression. They are free to meet as a group for religious purposes at school, J.A. 428,450, and they meet several nights each week in their homes. They also worship in the neighboring Westside Community Church. J.A. 140-141. As Justice Brennan pointed out in his concurring opinion in *Abington*, "[t]he student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others." 374 U.S. at 299. The constitutional barrier to the use of public school facilities to promote religious activity does not impair the students' ability to engage in prayer "outside of the school premises and at times other than during school hours." *Bender*, 741 F.2d at 560. Westside's policy in no way prevents respondents from practicing their religion.

3. The School Cannot Disclaim a Religious Endorsement

Finally, if Westside endorses a Christian club as a school club, as a constitutional matter, that endorsement cannot be disclaimed. In *Allegheny*, this Court recognized that such a disclaimer would simply demonstrate that, rather than communicating a message of its own, "the government is endorsing the religious message of that organization." 109 S. Ct. at 3105. "But the establishment clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communication by religious organizations." *Id.* If respondents succeed in establishing the Westside High School Christian Bible Club, they will have succeeded in compelling the school to endorse their religious views, without any free speech basis and contrary to the establishment clause.

D. School Religious Clubs Undermine the Public School's Ability to Foster Democratic Values of Equality and Tolerance.

To "prepar[e] . . . individuals for participation as citizens." our nation's public schools bear "the obligation to promote civic virtues." *Ambach* v. *Norwick*, 441 U.S. 68, 76 (1979). These "civic virtues" are those democratic principles which

enable us to coexist as citizens in a pluralistic society. *See Bethel* v. *Fraser*, 478 U.S. 679, 682 (1986); *Bd. of Educ.* v. *Pico*, 457 U.S. 853 (1982). *See generally* Yudof, *supra* note 10. To this end, the school's educational purpose is not value-free. Principles of racial and religious equality as well as religious tolerance are fundamental to our system. *See, e.g.*, The Declaration of Independence, Art. 1. This Court has emphasized repeatedly that it is the function of the public schools to promote these values. *See, e.g., Brown* v. *Bd. of Ed.*, 347 U.S. 483 (1954); *see Abington*, 374 U.S. 203.

There is no basis in either law or policy for respondents' claim to an "equal access" right to compel Westside to promote a particular religious message. *See Hazelwood*, 108 S. Ct. at 570; *Smith* v. *Bd. of Commissioners*, 827 F.2d 684. For example, nothing compels a school to sponsor an apartheid club in order to balance out the principles of nondiscrimination taught in the classroom. *See, e.g., Smith* v. *St. Tammany Parish Board*, 316 F. Supp. 1174 (E.D. La. 1970), *aff'd*, 448 F. 2d 414 (8th Cir. 1971).[12]

The public schools foster those values which allow students of different races and religions to study, work, and live together in harmony. In order to foster the habits of citizenship, it is essential to maintain separation of church and state in our public schools. Our nation's unparalleled religious diversity and freedom flourishes when personal religious choices are made free of pressure from governmental institutions.[13] Allowing a sectarian group to use the public school system to promote its beliefs and to proselytize interferes with an individual's freedom of conscience, and impedes the public schools' ability to promote "cohesion among a heterogeneous democratic people." *McCollum*, 333 U.S. at 216 (Frankfurter, J. concurring).

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[12]While the first amendment may protect the right of the Ku Klux Klan to meet at public schools when they are functioning as forums open to the community, *see, e.g., Knights of the KKK* v. *East Baton Rouge Parish School Board*, 578 F.2d 1122 (5th Cir. 1978), the EAA goes much further. Under the EAA, schools could be required to permit a student-initiated chapter of the Ku Klux Klan to meet on school premises during the school day. *See* 130 Cong. Rec. S.8340, 8343 (June 27, 1984).

[13]There are over 1200 religions and religious sects in this country. J. Melton, *A Directory of Religious Bodies in the United States*, xiii (1977).

CONCLUSION

In his concurring opinion in *Abington*, Justice Brennan declared:

> It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.

374 U.S. at 241-242 (emphasis in original). The EAA and its application in this case violate the establishment clause of the first amendment; by sanctioning sectarian religious activities in our nation's public schools, it interferes with the right of the individual to believe as he or she sees fit and it undermines the school's ability to instill in students the vital democratic values of respect and tolerance.

For the reasons stated herein, *amici* respectfully urge that the decision of the court of appeals be reversed.

Respectfully submitted,

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APPENDIX A

MEMBER ORGANIZATIONS OF THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL

Birmingham JCC
Greater Phoenix Jewish Federation
Tucson Jewish Federation of Southern Arizona
Greater Long Beach and West Orange County Jewish Community Federation
Los Angeles CRC of Jewish Federation-Council
Oakland Greater East Bay JCRC
Orange County Jewish Federation
Sacramento JCRC
San Diego CRC of United Jewish Federation
San Francisco JCRC
Greater San Jose JCRC
Greater Bridgeport Jewish Federation
Greater Danbury CRC of Jewish Federation
Eastern Conn. Jewish Federation
Greater Hartford CRC of Jewish Federation
New Haven Jewish Federation;
Greater Norwalk Jewish Federation
Stamford United Jewish Federation
Waterbury Jewish Federation
JCRC of Connecticut
Wilmington Jewish Federation of Delaware
Greater Washington JCC
South Broward Jewish Federation
Greater Fort Lauderdale Jewish Federation
Jacksonville Jewish Federation
Greater Miami Jewish Federation
Greater Orlando Jewish Federation

Palm Beach County Jewish Federation
Pinellas County Jewish Federation
Sarasota-Manatee Jewish Federation
South County Jewish Federation
Atlanta Jewish Federation
Savannah Jewish Council
Metropolitan Chicago JCRC of the Jewish United Fund
Peoria Jewish Federation
Springfield Jewish Federation
Indianapolis JCRC
South Bend Jewish Federation of St. Joseph Valley
JCRC of Indiana
Greater Des Moines Jewish Federation
Lexington Central Kentucky Jewish Federation
Louisville Jewish Community Federation
Greater Baton Rouge Jewish Federation
Greater New Orleans Jewish Federation
Shreveport Jewish Federation
Portland Southern Maine Jewish Federation-Community Council
Baltimore JCRC
Greater Boston JCRC
Marblehead North Shore Jewish Federation
Greater New Bedford Jewish Federation
Springfield Jewish Federation
Worcester Jewish Federation
Metropolitan Detroit JCC
Flint Jewish Federation
Minneapolis Minnesota and Dakotas JCRC-Anti-Defamation League
Greater Kansas City Jewish Community Relations Bureau
St. Louis JCRC
Omaha JCR Committee of Jewish Federation

Atlantic County Federation of Jewish Agencies
Central New Jersey Jewish Federation
Clifton-Passaic Jewish Federation
Delaware Valley Jewish Federation
Metrowest United Jewish Federation
Greater Middlesex County Jewish Federation
Northern New Jersey JCRC
Southern New Jersey JCRC of Jewish Federation
Albuquerque JCC
Binghamton Jewish Federation of Broome County
Greater Buffalo Jewish Federation
Elmira CRC of Jewish Welfare Fund
Greater Kingston Jewish Federation
New York JCRC
Northeastern New York United Jewish Federation
Greater Orange County Jewish Federation
Rochester Jewish Community
Syracuse Jewish Federation
Utica Jewish Federation
Akron Jewish Community Federation
Canton Jewish Community Federation
Cincinnati JCRC
Cleveland Jewish Community Federation
Columbus CRC of Jewish Federation
Greater Dayton CRC of Jewish Federation
Greater Toledo CRC of Jewish Federation
Youngstown JCRC of Jewish Federation
Oklahoma City JCC
Tulsa JCC
Portland Jewish Federation
Allentown CRC of Jewish Federation
Erie JCC
Greater Philadelphia JCRC

Pittsburgh CRC of United Jewish Federation
Scranton-Lackawanna Jewish Federation
Greater Wilkes-Barre Jewish Federation
Providence CRC of Rhode Island Jewish Federation
Charleston JCR Committee
Columbia CRC of Jewish Welfare Federation
Memphis JCRC
Nashville and Middle Tennessee Jewish Federation
Austin JCC
Greater Dallas JCRC of Jewish Federation
El Paso JCR Committee
Fort Worth Jewish Federation
Greater Houston Jewish Federation
San Antonio JCR of Jewish Federation
Newport News-Hampton United Jewish Community of the Virginia Peninsula
Richmond Jewish Community Federation
Tidewater United Jewish Federation
Greater Seattle Jewish Federation
Madison JCC
Milwaukee Jewish Council

APPENDIX B

MEMBER ORGANIZATIONS OF THE NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY JOINING IN THIS BRIEFS

American Association of School Administrators
The National Education Association
National P.T.A.
The Committee for Public Education and Religious Liberty
Americans for Religious Liberty
The American Civil Liberties Union
The Minnesota Civil Liberties Union
The American Ethical Union
The National Service Conference of the American Ethical Union
American Hum. Association
Council for Democratic and Secular Humanism
Ohio Association for Education and Religious Lib.
Michigan Council Against Parochaid
Public Funds for Public Schools of New Jersey
Munroe County PEARL
Central Conference of American Rabbis

No. 88-1597

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL.,

Petitioners,

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE COUNCIL ON RELIGIOUS FREEDOM AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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Question Presented

Whether the Equal Access Act, to the extent that it requires public secondary school authorities to permit organized student religious club groups to hold meetings on school grounds, violates the Establishment Clause?

Statement of Interest

The American Jewish Committee ("AJC"), a national organization founded in 1906, is dedicated to the defense of the civil rights and civil liberties of all Americans. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty and has proved of inestimable value to the free exercise of religion in our pluralistic society.

The Council on Religious Freedom is a nonprofit corporation which was formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate the unnecessary entanglement of religion and state and other areas of concern which interfere with the full experience of religious freedom. Its Board of Directors is composed of individuals who are active in religious affairs, some in an official capacity and some on a lay basis, and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any official endorsement of particular religious doctrines in contravention of the Establishment Clause of the First Amendment.

In the view of *amici*, to permit a secondary school student club to hold organized religious activities, with the implicit imprimatur of official approval that necessarily attaches to such a club, would violate the First Amendment's Establishment Clause. Parents who enroll their children in public schools to receive the secular education required by the State have a right to expect that their children will not be drawn away from their own faith and into another which may be anathema to them.

TABLE OF CONTENTS

	Page
Question Presented	i
Statement of Interest	i
Table of Authorities	v
Statement of the Case	1
Summary of Argument	2
Argument	
THE EQUAL ACCESS ACT, TO THE EXTENT THAT IT REQUIRES A PUBLIC SCHOOL HAVING A LIMITED OPEN FORUM TO PERMIT ORGANIZED STUDENT RELIGIOUS GROUPS TO HOLD MEETINGS ON SCHOOL GROUNDS, VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.	
A. Religious Expression and Secular Speech are Not Constitutionally Equivalent in All Cases Involving Public Fora	4
B. Public High Schools Generally are Not Limited Public Fora	7

C. The Establishment Clause Prohibits Public Schools from Granting Official Recognition to Religious Student Groups 12

D. No Less Restrictive Alternative is Available 23

E. No Plausible Free Exercise Claim Exists 25

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES:

Abington School District v. Schempp, 374 U.S. 203 (1962) 7, 13, 17, 22, 28
Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) 7
Bethel School District v. Fraser, 478 U.S. 675 (1986) 10
Bowen v. Roy, 476 U.S. 693 (1986) 27
Cantwell v. Connecticut, 310 U.S. 296 (1940) 7
Cary v. Brown, 447 U.S. 455 (1980) 5
Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 15
Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985) 8, 11
Edwards v. Aguillard, __ U.S. __, __, 96 L. Ed. 2d 510 (1987) 17
Engel v. Vitale, 370 U.S. 421 (1962) 12, 13
Epperson v. Arkansas, 393 U.S. 97, 104 (1968) 12
Everson v. Board of Education, 330 U.S. 1 (1947) 5
Frazee v. Employment Security Dept., __ U.S. __, 103 L. Ed. 2d 914 (1989) 25
Greer v. Spock, 424 U.S. 828 (1976) 8
Hazelwood School Dist. v. Kuhlmeier, 484 U.S. __, 98 L. Ed. 2d 592 (1988) 3, 9, 10, 11, 18, 20
Jennes v. Fortsan, 403 U.S. 431 (1971) 28
Lemon v. Kurtzman, 403 U.S. 602 (1971) 2, 4, 14, 15, 22

McCollum, Illinois ex. rel., v. Board of Education, 333 U.S. 203 (1948) 17, 27
Mergens v. Board of Education of the Westside Community Schools, No. CV 85-0-426, slip op. at __ (D.Neb. May 23, 1985) 19, 26
Minneapolis Star v. Minnesota Comm. of Revenue, 460 U.S. 575 (1983) 15
Perry Ed. Assn. v. Perry Local Ed. Assn., 460 U.S. 37 (1983) 7, 8
Shelton v. Tucker, 364 U.S. 479, 487 (1960) 12
Stone v. Graham, 449 U.S. 39 (1980) 13
Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) 27
Tilton v. Richardson, 403 U.S. 672 (1971) 16
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 9, 10, 26
Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985) 25
Wallace v. Jaffree, 472 U.S. 38 (1985) 5, 13, 14, 15, 26, 28
Walz v. Tax Commission, 397 U.S. 664 (1970) 12
Widmar v. Vincent, 454 U.S. 263 (1981) 2, 5, 6, 11, 14, 15, 16, 23
Zorach v. Clauson, 343 U.S. 306 (1952) 7

CONSTITUTIONAL PROVISIONS AND STATUTES:

First Amendment, United States Constitution 4, 5, 6, 7, 9, 10, 15, 22

Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) 2, 4, 12, 19

OTHER AUTHORITIES:

Brief for the United States as *Amicus Curiae* Supporting Petitioners in *Bender v. Williamsport Area School District, et al.,* No. 84-773 22, 25

130 Cong. Rec. H 12273 (daily ed. Oct. 11, 1984) 20

Gianelli, *Religious Liberty, Nonestablishment and Doctrinal Development, pt. II, the Nonestablishment Principle,* 81 Harv. L. Rev. 513 (1968) 17

Tribe, *American Constitutional Law* (2nd ed. 1988) 22

In the Supreme Court of the United States

October Term, 1988

No. 88-1597

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), ET AL., PETITIONERS

v.

BRIDGET C. MERGENS, BY AND THROUGH HER NEXT FRIEND, DR. DANIEL N. MERGENS, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN JEWISH COMMITTEE AND THE COUNCIL ON RELIGIOUS FREEDOM AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Statement of the Case

Amici adopt the factual presentation set forth in Petitioners' Statement of the Case.

This brief is submitted with the consent of the parties.

Summary of Argument

The provisions of the Equal Access Act, 20 U.S.C. §§ 4071-4072 (1984) (the "Act"), which require public secondary schools maintaining a limited open forum to grant religious student groups access to school facilities on the same basis as other student clubs and activities, impermissibly advance religion and create excessive entanglement between state institutions and religion -- thus violating two prongs of the Establishment Clause test set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

By failing to distinguish this Court's holding in *Widmar v. Vincent,* 454 U.S. 263 (1981), from the present case, the Court of Appeals for the Eighth Circuit erred when it ruled that the Act, insofar as it affords access to religious groups, was constitutional. Unlike *Widmar*'s university setting, the setting contemplated by the Act is that of a public secondary school. There can be no question that there are significant and cognizable differences between the impact of officially recognized religious groups meeting at these two types of institutions. College students are adults and are not subject to compulsory attendance laws. Not only are college students more mature and less impressionable, they have greater freedom to select and reject because of the independence that comes with adulthood and maturity.

Because students at schools affected by the Act are younger and more impressionable than those at universities and are also subject to compulsory attendance laws, these students might perceive the religious access required by the Act as bearing the

imprimatur of the school, thus having the effect of advancing religion. Moreover, because the Act allows school authorities to permit the occasional attendance of "nonschool person[s]" at meetings of student religious groups, clergy may enter schools and proselytize students, the effect of which would clearly advance religion.

While student free speech rights may be implicated when school authorities refuse to grant official recognition and access to school facilities to student groups based on the content of a group's speech, there was no constitutional violation in the school's action in the present case. This Court recognized in *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. __, 98 L. Ed. 2d 592 (1988), that public schools have legitimate pedagogical concerns which can be protected by exercising reasonable control over the content of those forms of student speech affirmatively promoted by the school. Access to school facilities by, and official registration of, student groups undoubtedly promote such groups affirmatively. Here, the interest in enforcing the separation of church and state in public schools is not only reasonable but compelling. In the conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's compelling interest in preventing the appearance of official promotion of, and an impermissible entanglement with, religious activities in a public secondary school.

There is available no less restrictive alternative to prohibiting official recognition of, and access to school facilities by, student religious groups. The posting of disclaimers and notices disavowing school sponsorship or involvement with the meetings of such groups would

nevertheless leave open a serious potential for ostracization and stigmatization of those students who elect not to participate in such religious activities. Moreover, the danger of school faculty or monitors becoming entangled in decisions having religious dimensions -- possibly with members of the clergy who come onto school grounds -- would not be resolved by taking such an ameliorative action. These are the very types of dangers which led the Framers to create an Establishment Clause whose concerns are co-equal with the legitimate concerns protected by the constitutional right of free speech.

ARGUMENT

THE EQUAL ACCESS ACT, TO THE EXTENT THAT IT REQUIRES A PUBLIC SCHOOL HAVING A LIMITED OPEN FORUM TO PERMIT ORGANIZED STUDENT RELIGIOUS GROUPS TO HOLD MEETINGS ON SCHOOL GROUNDS, VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Religious Expression and Secular Speech are Not Constitutionally Equivalent in All Cases Involving Public Fora.

The First Amendment to the Constitution mandates that "Congress shall make no law respecting an establishment of religion." As this Court explained in *Lemon v. Kurtzman,* 403 U.S. 602, 614 (1971), this provision was intended by the Framers "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." In serving that

end, the Framers instituted a governmental policy of "neutrality" with respect to religion, which requires that "[n]either a state nor the Federal Government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education,* 330 U.S. 1, 15 (1947). The Court recently reiterated this established principle in *Wallace v. Jaffree,* 472 U.S. 38 (1985), asserting that "the government must pursue a course of complete neutrality toward religion." *Id.* at 60.

To be sure, the First Amendment does not require -- or even contemplate -- a regime of hostility toward religion. This was made clear at the beginning of the Republic when the Establishment Clause was directly juxtaposed with the Free Exercise Clause. This theme was further explicated when the Court recognized, in *Widmar v. Vincent,* 454 U.S. 263, 270 (1981), that the Establishment Clause is "limited by" the Free Speech clause, so as to require that regulation of religious speech with respect to public fora on a content-related basis be subject to "applicable constitutional standards." To say this, however, is not to suggest that the constitutional standards which are "applicable" will always be identical for religious and non-religious speech.

Thus, in *Widmar,* the Court applied the well-settled rule that, in order for the state to justify a content-based exclusion of particular speech, it must show -- even with respect to religious speech -- that the challenged regulation is necessary to serve a compelling state interest and that it is narrowly drawn to serve that end. *Widmar,* 454 U.S. at 270 (citing *Cary v. Brown,* 447 U.S. 455, 461, 464-65 (1980)). Upon applying that test, the

Court found that a public university had failed sufficiently to meet this exacting standard in demonstrating why religious student groups should not be afforded the same access to university facilities as secular student groups.

In reaching that conclusion, the Court specifically acknowledged that the interest of the university in complying with its constitutional obligations under the Establishment Clause "may be characterized as compelling, " but found -- in that specific case -- that the compelling interest did not necessitate the barring of religious groups from the public forum. *Widmar,* 454 U.S. at 271. In so saying, the Court implicitly acknowledged that the "applicable constitutional standards" are not identical for religious and non-religious speech, and that application of those standards will not always lead to identical results. Indeed, had the Court found otherwise, it would have obviated the special concerns that led the Framers to deal with religious expression as a *sui generis* concern in the First Amendment. Where the treatment in a public forum of religious expression on the same basis as non-religious speech would, in a specific case, endanger the State's mandated "neutrality" with respect to religion, it follows that the compelling state interest in avoiding the establishment of religion may, in that case, prohibit the affording of "equal access" for religious groups in such a public forum, even while permitting -- or even mandating -- such access in another public forum. In each case the Court must analyze the particular facts in terms of the countervailing principles involved.

The Court is not new to making fine distinctions

based on specific fact patterns in the area of the Religion Clauses and public schools. Thus, in *Abington v. Schempp,* 374 U.S. 203 (1962), where the Court invalidated Bible reading and recitation of the Lord's Prayer in public schools, the Court distinguished the circumstances in that case from *Zorach v. Clauson,* 343 U.S. 306 (1952), in which the Court held that "released-time" programs which permit public school students to depart school premises during the school day in order to receive religious instruction **elsewhere** do not violate the Establishment Clause. "[The Bible reading and prayer recitation] are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in *Zorach v. Clauson.*" *Abington* at 223.

B. Public High Schools Generally are Not Limited Public Fora.

The First Amendment generally prohibits government from "restrict[ing] expression because of its message, its ideas, its subject matter or its content." *Arkansas Writers' Project v. Ragland,* 481 U.S. 221, 231 (1987).[1] This Amendment, however, "does not guarantee access to property simply because it is owned or controlled by the government." *Perry Ed. Assn. v. Perry Local Ed. Assn.,* 460 U.S. 37, 46 (1983). Because government, "no less than a

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[1] "The First Amendment, of course, is made applicable to the states by the Fourteenth Amendment. *See Cantwell v. Connecticut,* 310 U.S. 296, 303 (1940) ("The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment.").

private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated," *Greer v. Spock,* 424 U.S. 828, 836 (1976), the Court has distinguished between public fora, limited public fora, and non-public fora in determining "the extent to which [g]overnment can control access..." to public property. *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.,* 473 U.S. 788, 800 (1985).

Speakers can be excluded on a speech content basis from traditional public fora, such as public streets and parks, only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. *Cornelius,* 473 U.S. at 800. The government can choose to create a "limited public forum" by designating "a non-traditional forum [as a place] for public discussion." *Cornelius,* 473 U.S. at 802. Content based exclusions from a limited public forum must meet the same requirements as those in a traditional forum. Id at 800. Access to non-public fora, on the other hand, "can be restricted [on the basis of speech content] as long as the restrictions are 'reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view.'" *Cornelius,* 460 U.S. at 800 (quoting *Perry,* 460 U.S. at 46).

Historically, public schools have not been considered public fora.

> The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating

> thoughts between citizens, and discussing public questions."

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. __, 98 L. Ed. 2d 592, 602-3 (1988) (citations omitted). Even so, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506 (1969). In *Tinker,* the Court held that a public school cannot prohibit students from expressing personal views, even on controversial issues, unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 602 (quoting *Tinker,* 393 U.S. at 509). But "[t]he question whether the First Amendment requires a school to tolerate particular student speech - the question that [the Court] addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 605.

Arguably, student free speech rights are implicated whenever school authorities grant official recognition -- and access to school facilities -- to some student groups but not others. The Court, however, has never held that the speech rights which public school students possess inside the schoolhouse gate are the same as those of non-students, or even of students outside the schoolhouse gate. Moreover, the First Amendment does not restrict political opinions, but it does restrict efforts that may lead to religious establishments.

> [T]he First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," *Bethel School District No. 403 v. Fraser,* 478 U.S. 675, 682 (1986), and must be "applied in light of the special characteristics of the school environment." *Tinker,* 393 U.S. at 506. A school need not tolerate student speech that is inconsistent with its "basic educational mission," *Fraser,* 478 U.S. at 685, even though the government could not censor similar speech outside the school.

Hazelwood, 484 U.S. at __, 98 L. Ed. 2d at 602.

Thus, the Court in *Fraser* held that a public school could discipline a student for a "sexualiy explicit" speech given during a school sponsored assembly because the school was entitled to "disassociate itself" from speech that is "wholly inconsistent with the 'fundamental values' of public school education." *Fraser,* 478 U.S. at 685-6. Similarly, the Court in *Hazelwood* held that "educators do not offend the First Amendment by exercising editorial control over the style and **content of student speech in school-sponsored expressive activities** so long as their actions are reasonably related to legitimate pedagogical concerns." Id., 484 U.S. at __, 98 L. Ed. 2d at 606. (emphasis supplied).

Implicit in these holdings is that public schools normally are not public fora. The fact that a school has created a system of after-school clubs which is limited to

promoting the "basic educational mission" of the school[2] does not mean that a limited public forum has been created. "The government does not create a [limited] public forum by inaction or by **permitting limited discourse**, but only by intentionally opening a non-traditional forum for public discussion." *Cornelius,* 473 U.S. at 802 (emphasis supplied).

It is clear from the trial testimony of officials at Westside High School (WHS) that they have not intentionally opened WHS' facilities "for **indiscriminate** use by ... student organizations." *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 602-3 (citations omitted) (emphasis supplied). Thus, it may exclude certain groups from its officially sanctioned club system on a speech content basis in order to avoid religious influences in secular education, surely a "legitimate pedagogical concern[]." *Id.* at 606. It is not for the federal courts to second guess a school's "determination of what manner of speech [in school sanctioned activities] is inappropriate." Id. at 602.

Nevertheless, even if WHS is deemed to have created a limited public forum such that it must meet the far more demanding standards of justifying exclusions from traditional public fora,[3] or otherwise falls within the

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[2] Each and every existing student activity at WHS was required to, and did, advance the educational mission of the school. Joint Appendix ("J.A.") 220, 230, 296-97.

[3] "In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech..., [the state] must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar,* 454 U.S. at 269-70.

obligations imposed by the Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) (the "Act"), on a school maintaining a "limited open forum," the strictures of the Establishment Clause must take priority. As is shown below, those strictures are not only a reasonable concern in the environment of public schools but a compelling state interest that overrides certain free speech concerns and requires the denial of official school access and recognition of religious groups.

C. The Establishment Clause Prohibits Public Schools from Granting Official Recognition to Religious Student Groups.

The Establishment Clause was intended to protect against three primary evils: the "sponsorship, financial support, and active involvement" of the state in religious activity. *Walz v. Tax Commission,* 397 U.S. 664, 668 (1970). Recognizing that "a union of government and religion tends to destroy government and to degrade religion," *Engel v. Vitale,* 370 U.S. 421, 431 (1962), the Court has nowhere been more strictly watchful of the separation of church and state than in the case of the public elementary and secondary schools.[4] The Court has consistently invalidated any appearance of sponsorship or entanglement with religious practice in the schools. As

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[4] "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker,* 364 U.S. 479, 487 (1960).

Justice Frankfurter stated in his concurring opinion in *Illinois ex. rel. Mc Collum v. Board of Education,* 333 U.S. 203, 216 (1948),

> The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children ... in an atmosphere free of pressures in a realm ... where conflicts are most easily and most bitterly engendered.

The nature of school-age children and youngsters, who are generally acknowledged to be at an age where "non-conformity is not an outstanding characteristic," was also remarked upon by Justice Frankfurter as an important consideration. *Id.* at 227.

Thus, the Court has struck down as unconstitutional a state's practice of authorizing the recital of brief, denominationally neutral, "voluntary" prayers at the beginning of each school day (*Engel,* 370 U.S. 421), government sanctioned Bible readings and recitation of the Lord's Prayer in public schools (*Abington,* 374 U.S. 203), and state legislation authorizing the posting of the Ten Commandments on the walls of public classrooms (*Stone v. Graham,* 449 U.S. 39 (1980) (*per curiam*).

It is this scrupulous avoidance of any hint of endorsement of religious practice in the public school, a principle reinforced by the Court's holding in *Wallace v. Jaffree,* that must be borne in mind in applying the Establishment Clause to the case at bar. Because of the special role of the public schools, and the Court's special concern with the avoidance of placing improper

pressures on those who are the most impressionable, the Constitution requires public high schools to do that which public universities are forbidden to do, i.e., deny official recognition and "equal access" to school facilities (and the concomitant appearance of endorsement) to student religious groups. To the extent that this may be deemed to create a conflict between the Free Speech Clause and the Establishment Clause, the balance must be weighted in favor of the State's interest, recognized as compelling in *Widmar,* in preventing violations of the Establishment Clause in a public secondary school. 454 U.S. at 271.

In *Lemon v. Kurtzman,* 403 U.S. 602 (1971), this Court set forth the by now familiar three-prong test for identifying Establishment Clause violations, the validity of which was reaffirmed by a majority of the Court in *Wallace v. Jaffree,* 472 U.S. at 55-56 (Court's opinion), 63 (Powell, J., concurring). Each of three requirements must be met if governmental practice is to be upheld against an Establishment Clause challenge: "First the [governmental practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion....: finally, the [practice] must not foster 'an excessive governmental entanglement with religion.'" *Lemon,* 403 U.S. at 612-13.

(i) Sectarian Legislative Purpose.

Amici do not dispute the secular purpose behind WHS' organized club system. The alleged secular purpose behind the Act, however, is open to question. The Act was enacted in the aftermath of the defeat of efforts to amend the Constitution to provide for

organized prayer as a part of the public school day which the Constitution, as currently written, prohibits. *See Wallace v. Jaffree,* 472 U.S. 38. As originally introduced, the Act singled out religious groups for preferred status. Only last minute amendments extended the provisions of the Act to a broader range of speech activity. However, even if the passage of the Act was motivated by a legitimate secular purpose, provisions of the Act violate the last two prongs of the *Lemon* analysis. "Illicit legislative intent is not the sine qua non of a violation of the First Amendment.... [The Court] has long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star v. Minnesota Comm. of Revenue,* 460 U.S. 575, 592 (1983) (citations omitted).

(ii) Principal or Primary Effect of Advancing Religion.

Implementation of the Act has a principal or primary effect of advancing religion. Concededly, "not every law that confers an 'indirect', 'remote', or 'incidental' benefit upon religious institutions is, for that reason alone, constitutionally invalid." *Committee for Public Education v. Nyquist,* 413 U.S. 756, 771 (1973). It is also acknowledged that the Court, in *Widmar,* looked to the forum's availability to a broad spectrum of groups in determining that the opening of the university's forum to a religious student group would not have the primary effect of advancing religion. *Widmar,* 454 U.S. at 274-75.

In so holding, however, the Court noted that "an open forum in a public **university** does not confer a

confirmation of State approval of religious sects and practices," *id.*, 454 U.S. at 274 (emphasis supplied), and specifically contrasted university and secondary students: "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the university's policy is one of neutrality toward religion." Id., 454 U.S. at 274 n.14. This factor, the lesser impressionability of older, college students and, accordingly, the lesser likelihood that such students would perceive a religious group as enjoying official endorsement, was treated by the *Widmar* Court as an independent factor justifying the opening of the university to religious groups, wholly apart from the fact that its open forum was available to a broad spectrum of groups, as the Act similarly provides.

It is the clear import of *Widmar* that, where such student perception of official imprimatur is likely to result, the opening of school facilities to a religious group would have, as a primary effect, the advancement of religion.

The distinction between university and high school settings was borne out, in *Tilton v. Richardson,* 403 U.S. 672 (1971), in which this Court upheld grants to church-related colleges and universities for the construction of buildings and facilities exclusively for secular educational purposes, based, in part, upon the observation that:

> There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination... The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the

> congressional objectives or limitations. Furthermore, by their very nature, college and post-graduate courses tend to limit the opportunity for sectarian influence by virtue of their own internal disciplines.

Id., 403 U.S. at 686 (citing Gianelli, *Religious Liberty, Nonestablishment and Doctrinal Development, pt. II, the Nonestablishment Principle,* 81 Harv. L. Rev. 513, 583 (1968)). The Court has continued to recognize a distinction between university and secondary school students. "The potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses [than with regard to students in public high schools]. '**This distinction warrants a difference in constitutional results.**'" *Edwards v. Aguillard,* __ U.S. __, __, 96 L. Ed. 2d 510, 519 n.5 (1987) (quoting *Abington,* 374 U.S. at 253) (emphasis supplied). This general distinction is reinforced by the fact that a substantial proportion of the students at a secondary school are subject to compulsory attendance laws. *McCollum,* 333 U.S. at 212.

High schools, in contrast to universities, present a more limited, socializing function, as one would expect in the context of a younger student body still being educated as to the broader values which will ultimately form the framework within which they can approach the give-and-take of college study. As this Court has stated, an important function of high schools is the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system." *Fraser,* 478 U.S. at 681. These differing roles of the high schools and colleges make clear that an officially recognized school religious organization in a secondary school is more likely to

appear to enjoy official endorsement than one at a university.[5]

This observation is further buttressed by the nature of organized student clubs at most modern American public schools. While a student group, by its very definition, requires student involvement in order to exist, this does not necessarily mean that students are always the initial impetus behind a group's formation. Teachers and administrators often play a major role in the creation and direction of school clubs.[6] Not surprisingly, most registered student groups at a modern American public secondary school are not merely tolerated but are affirmatively promoted by the school administration because of the socializing benefits of school club participation.[7] They further the secular educational mission of the school.[8] Religious clubs, by their very

[5] That differing role is made clear by this Court's determinations in *Hazelwood* and *Fraser*, in which cases school authorities were allowed to restrict the speech of secondary school students in a fashion which would be unacceptable for students at the university level. *See* the discussion in Section C above.

[6] In the case of WHS, all after-school student clubs are under the direct supervision of an assistant principal, to whom the faculty sponsors were accountable for the activities, goals, and objectives of their clubs. J.A. 342.

[7] At WHS, all existing student clubs are "officially sanctioned." J.A. 252.

[8] Petitioner School Board Policy 5610 recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." *Mergens v. Board of Education of the Westside*

nature, cannot further this secular mission. If schools are compelled by the Act to recognize religious groups and grant them access to school facilities, these groups will be the only type of club which schools would not, and constitutionally could not, hold implicitly or explicitly in favor. As discussed above, it is far from certain that students below the university level would be able to make this crucial distinction.

The risk of religious proselytization occurring on school grounds as a result of the Act cannot be dismissed. Parents who enroll their children in public schools to receive the secular education required by the State have a right to expect that their children will not be drawn away from their own faith and into another which may be anathema to them. A highschool student might be proselytized away from the family religion without the parents even being aware that it was transpiring, in of all places, a government institution, with the blessing of the government and the law. The courts could be faced with law suits filed by parents charging that the government allows proselytizing which steals the allegiance of students away from the family's traditional religion.

Respondent Mergens' proposed Christian Bible Club was to be "a vehicle for proselytizing those who had not yet 'accepted' Christ." J.A. 252. According to Rep. William F. Goodling, a prime sponsor of the Act, "[t]he Equal Access Act imposes only one basic requirement on school administrators. Student-initiated religious groups

Community Schools, 867 F. 2d 1076, 1077 (8th Cir. 1989).

must receive the same treatment as other student-initiated groups." 130 Cong. Rec. H 12273 (daily ed. Oct. 11, 1984). Respondent's group "sought all privileges enjoyed by other student activities, other than the 'right' to a school paid and selected 'sponsor' to direct its activities." J.A. 59. At WHS, as at most public high schools, "[o]fficial approval carrie[s] with it access to school facilities, including the bulletin board, public address system, and school year book. Recognized clubs aggressively recruit[] new members at an annual school-sponsored Club Fair, which [takes] place during the regular school day." J.A. 100-01, 119, 132, 155-56, 419-22. Access to these facilities, which "[s]tudents ... might reasonably perceive to bear the imprimatur of the school," *Hazelwood,* 484 U.S. at __, 98 L. Ed. 2d at 605, also provides religious groups with an effective means to proselytize their message on school grounds, occasional access to which even members of the clergy may be entitled.[9]

The "fundamental values... essential to a democratic society," the inculcation of which the Court time and time again has stressed is the mission of public education, "must, of course, include tolerance of

[9] The Equal Access act prohibits secondary schools deemed to have a "limited open forum" from denying "a fair opportunity to ... any students who wish to conduct a meeting within that limited open forum on the basis of the religious ... content of the speech at such meetings." 20 U.S.C. § 4071(a). Since schools are deemed to provide "a fair opportunity" when they provide that "nonschool persons may not direct conduct, control, or **regularly attend** activities of student groups," 20 U.S.C. § 4071(c)(5) (emphasis supplied), the Act leaves the schoolhouse gate open for the occasional visit of nonschool persons.

divergent... religious views... [and] must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students." *Fraser,* 478 U.S. at 682. A school can hardly be said to take into account the sensibilities of its students when it lends official access to its school sanctioned club system to religious groups, thus exposing its students to groups which, rather than expressing tolerance of the religious views of others, seek to indoctrinate them with their own particular views.

(iii) Likelihood of Excessive Entanglement.

The presence of school personnel during meetings of student groups, deemed by most school authorities to be an essential requirement for the proper running of a secondary school-- and, in many cases, compelled by insurance regulations-- creates a nearly unavoidable likelihood of excessive entanglement between religion and government.

The Act requires schools deemed to have a limited open forum not to allow nonschool persons to "direct, conduct, control, or regularly attend activities of student groups." 20 U.S.C. § 4071 (c)(5). Thus, school authorities would have to maintain detailed attendance records of nonschool persons, very possibly members of the clergy, and would have to interrupt and escort from school premises these outside persons when they violate the limitations imposed by the Act on their involvement with student groups. The sight of students in a classroom witnessing religious figures arguing with school officials about the frequency of their attendance and degree of involvement at religious meetings is surely one to be

avoided.

This Court has consistently struck programs of aid for secular purposes to religious schools where administration of that aid would involve a "comprehensive, discriminating and continuing... surveillance" to ensure that the aid was not utilized for a forbidden purpose. *Lemon*, 403 U.S. at 619. Thorough monitoring of religious meetings by school authorities -- necessary to insure that constitutional and statutory requirements, in addition to valid school policies, are not violated -- constitutes this very kind of forbidden involvement.

The form of entanglement that the Supreme Court deems most subversive of First Amendment values, however, is that which involves government not only in the **apparatus** of religion but in "religion's very **spirit**, in its decisions on core matters of belief and ritual." Tribe, *American Constitutional Law*, § 14-11 at 1231 (2nd ed. 1988) (emphasis in original). It is fear of this most divisive of entanglements -- determination of who is right and who is wrong in fundamental matters of conscience -- that has led the Court to require of the government "... a strict neutrality toward theological questions." *Abington*, 374 U.S. at 243 (Brennan, J., concurring).

The introduction of religious doctrines and disputes into public schools creates a situation where government cannot remain neutral. It is not uncommon for high schools to require all school recognized clubs to advance the educational mission of the school. At WHS, this includes a requirement that all student activities "present

balanced views on controversial issues." J.A. 245-48, 254-55, 326-27, 273. The enforcement of this policy very likely would conflict with the orthodoxy of a religious group whose world view derives from a single source of truth. It is not difficult to imagine other conflicts between school officials and religious groups, including those involving religious beliefs.[10]

The Court acknowledged in *Widmar* that attempts by state institutions to identify religious groups in order to separate them from secular groups necessarily involve some degree of entanglement between religion and government. Balancing this factor with the characteristics of a state university, the Court found this entanglement to be not constitutionally excessive in that setting. As demonstrated above, permitting public schools to recognize religious groups, or requiring it as the Act does, would, on balance, lead to far greater entanglement. In light of the heightened importance of preventing divisive religious influences from gaining a foothold inside public schools, school authorities must be allowed to make a limited determination of what is, and what is not, religious activity, if the Establishment Clause is not to be drained of all meaning.

D. No Less Restrictive Alternative is Available.

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[10] For example, at a school where official student groups are required to elect club officers, an election dispute could ensnarl the school administration in a fight over who the real officers of a religious club are. A similar conflict regarding a group's leadership could erupt where school rules require democratically elected officers but the religious beliefs of a group require appointment by a church hierarchy.

There is available no less restrictive alternative to the denial of permission for students to hold group religious meetings under public school auspices. As has been discussed above, a law requiring a public school to permit such organized activity has the effect of creating an appearance of official school endorsement and is likely to create impermissible entanglement between religion and government.

It is possible to argue that, in view of the publicity surrounding the present case in which WHS' challenge to the Act is well known, there is little chance that students -- at least at WHS -- will perceive that WHS approves of the religious groups desiring school access and recognition. However, the constitutionality of permitting or requiring public school authorities to grant official recognition and access to student religious groups must depend on the perceptions children will have at schools which do not engage in similar court challenges or otherwise attempt to disassociate themselves from religious activities. Moreover, even attempts at discrimination, such as posting disclaimers at classroom entrances, would still leave open a serious potential for proselytization, ostracization, and stigmatization of those students who elect not to participate in the religious activities, and of faculty entanglement with those activities.

The Establishment Clause confers cognizable rights upon individuals. The U.S. Solicitor General implicitly recognized this fact when he stated, in the United States' *amicus* brief filed in support of the petitioners in the *Bender* case, that "[t]he Establishment Clause, no less

than the Free Speech or Free Exercise Clauses, was intended as a guarantee of liberty." Brief for the United States as *Amicus Curiae* Supporting Petitioners in ***Bender v. Williamsport Area School District, et al.***, No. 84-773, at 13. Surely, this guarantee of liberty includes the right of public school students not to be subjected to any religious proselytization, ostracization, or stigmatization which is facilitated by the state. Prohibiting public schools from granting official recognition and access to student religious groups is the only means to protect this constitutional right.

E. No Plausible Free Exercise Claim Exists.

There is no merit to a claim that the refusal of school authorities to grant official school access to student religious groups violates the Free Exercise Clause. In order to obtain an exemption from a state requirement under this clause, a claimant must show that the requirement conflicts with, and thus burdens, "a sincerely held religious belief." *Frazee v. Employment Security Dept.*, __ U.S. __, 103 L. Ed. 2d 914, 920 (1989). *See Tony & Susan Alamo Foundation v. Secretary of Labor,* 471 U.S. 290, 303 (1985) ("Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights").

In the present case, no conflict exists between the free exercise of respondents' beliefs and a state policy which prohibits public school authorities from granting official recognition to student religious groups. Just as "[n]o law prevents a student who is so inclined from praying

silently in public schools," *Wallace v. Jaffree,* 472 U.S. at 84 (O'Connor, J., concurring), no law or school regulation can prohibit students from assembling informally to discuss any topic, including religion, so long as such conduct does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of [a] school." *Tinker,* 393 U.S. at 509. There is nothing here to "accommodate". WHS administrators have done nothing to burden respondents' free exercise rights. Indeed, "[a]ny attempt by WHS to prohibit such informal meetings or exchanges between students, before or after instructional time, and even using school rooms or cafeteria tables, subject, of course, to reasonable time, place, and manner restrictions would meet strong constitutional objection." *Mergens v. Board of Education of the Westside Community Schools,* No. CV 85-0-426, Pet. for Cert. App. B at 30 (D.Neb. May 23, 1985). Cf. Tinker, 393 U.S at 513.

Thus, the only logical conclusion that can be drawn is that respondents object to a state policy prohibiting official recognition because their sincerely held religious beliefs require the state to acknowledge and promote their own beliefs. Respondents have not asserted this position. Nor is there evidence that the failure to grant official group recognition in any way burdens the exercise of their religion. But even if their beliefs included a demand that the state grant them official recognition, their claim would still fail.

> The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens... The

> Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.

Bowen v. Roy, 476 U.S. 693, 699-700 (1986).

Furthermore, "[t]he mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption is justified. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707, 718 (1981). As previously demonstrated, the vigorous enforcement of separation of church and state in public schools is a compelling state interest which cannot be effectively achieved through any less restrictive means other than by prohibiting official school recognition of student religious groups.

It cannot be stressed enough that this constitutional prohibition in no way evinces hostility toward religion. "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not ... manifest a governmental hostility to religion or religious teachings." *McCollum,* 333 U.S. at 211. Such a policy is simply a recognition of the unique role of religion in American life. "The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the

individual heart and mind." *Wallace v. Jaffree,* 472 U.S. at 53 n. 37 (quoting *Abington,* 374 U.S. at 226). Our forebears, long ago recognizing that religion differs from politics, art, philosophy, and other aspects of society, gave it special constitutional status. It is improper to accord religion a status equal to these other disciplines in the public schools. "[T]he grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jennes v. Fortsan,* 403 U.S. 431, 442 (1971).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Dated: September, 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF PEOPLE FOR THE AMERICAN WAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE AMICUS CURIAE	1
CONSENT OF THE PARTIES	2
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE EAA DOES NOT SUPPLANT SCHOOL AUTHORITY DISCRETION IN DEFINING PUBLIC SECONDARY SCHOOL CURRICULA OR THE RELATIONSHIP BETWEEN THOSE CURRICULA AND OFFICIALLY SANCTIONED STUDENT ACTIVITIES	5
A. Congress Defined Noncurriculum-Related Student Activities As Those Which Lack Official Sponsorship Or Direction	6
B. The EAA Does Not Require Public Secondary Schools To Become Limited Open Forums	9
C. The Westside High School Activities Program Does Not Establish An Open Forum	11
II. THE COURT OF APPEALS' CONSTRUCTION OF THE EAA UNNECESSARILY RAISES CONSTITUTIONAL CONCERNS UNDER THE ESTABLISHMENT CLAUSE	13
CONCLUSION	16

TABLE OF AUTHORITIES

PAGE

Cases

Bethel School District No. 403 v. *Fraser*, 478 U.S. 675 (1986) 10

County of Allegheny v. *American Civil Liberties Union*, 492 U.S. ___, 109 S. Ct. 3086 (1989) 4, 14, 15

Crowell v. *Benson*, 285 U.S. 22 (1932) 13

Garnett v. *Renton Area School District No. 403*, 874 F.2d 608 (9th Cir. 1989) 3, 8, 12

Garnett v. *Renton Area School District No. 403*, 675 F. Supp. 1268 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989) 8

Hazelwood School District v. *Kuhlmeier*, 484 U.S. 260 (1988) 10, 15

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 4, 15

Lynch v. *Donnelly*, 465 U.S. 668 (1984) 4, 14

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 13

Perry Education Association v. *Perry Local Educators' Association*, 460 U.S. 37 (1983) 11

Public Citizen v. *Department of Justice*, 491 U.S. ___, 109 S. Ct. 2558 (1989) 13

Tinker v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969) 15

University of California Regents v. *Bakke*, 438 U.S. 265 (1978) 10

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 16

Widmar v. *Vincent*, 454 U.S. 263 (1981) 11, 12, 14, 15

PAGE

Statutes

Equal Access Act, 20 U.S.C. §§ 4071, *et seq.* 2

20 U.S.C. § 4071(a) 5

20 U.S.C. § 4071(b) 3, 5

20 U.S.C. § 4071(c)(1) 7

20 U.S.C. § 4071(c)(2) 7

20 U.S.C. § 4071(c)(3) 4

Legislative Materials

130 Cong. Rec. S8342 (daily ed. June 27, 1984) ..... *passim*

130 Cong. Rec. S8343 (daily ed. June 27, 1984) 8, 10

130 Cong. Rec. S8338 (daily ed. June 27, 1984) 10

130 Cong. Rec. S8357 (daily ed. June 27, 1984) 9

130 Cong. Rec. H7738 (daily ed. July 25, 1984) 10

S. Rep. 357, 98th Cong., 2d Sess. 2379 (1984) 10

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BRIEF OF PEOPLE FOR THE AMERICAN WAY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

People For the American Way is a member-based, nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. It was founded in 1980 by religious, civic and education leaders devoted to the Nation's heritage of tolerance and pluralism and has 277,000 members nationwide. The organization's primary mission is to educate the public on issues of vital importance to our democratic tradition and to resist attacks from those who would impose narrow sectarian constraints on our free society.

People For the American Way is strongly committed to public education in order to promote the American tradition of free thought and worship and to preserve it for the generations to come. In particular, the organization believes that public schools can achieve their goal of preparing students to meet the challenges of a complex and demanding society only by fostering

students' intellectual curiosity and personal responsibility for resolving the issues that affect their lives.

A basic tenet of People For the American Way is that genuine First Amendment expression in schools must be free from sectarian pressures by school authorities aimed at promoting undesirable conformity, and that intellectual discussion is strengthened when students draw upon diverse backgrounds and philosophies. For this reason, the organization has actively participated in public debate and litigation concerning excellence and values in public education.

Because the decision of the court of appeals in this case could thwart public secondary schools from carrying out their educational mission by introducing religious activities into the schools as part of officially sponsored student activity programs, People For the American Way respectfully submits this brief as *amicus curiae* in support of petitioners.

CONSENT OF THE PARTIES

The United States has consented in writing to the filing of this brief as *amicus curiae*. A copy of that consent letter is being filed with this brief. All other parties filed a blanket consent letter on July 15, 1989 authorizing any party to file a brief as *amicus curiae*.

SUMMARY OF ARGUMENT

This case involves the proper interpretation of the Equal Access Act, 20 U.S.C. §§ 4071, *et seq.* ("EAA" or "Act"), enacted by Congress in 1984 to reconcile the competing interests of three fundamental rights protected by the First Amendment: the free exercise of religion, free expression, and the prohibition of establishment of religion. By according the EAA an extremely broad reading required neither by its language nor legislative history, the Court of Appeals for the Eighth Circuit sharply increased the risk of public school entanglement with religion in violation of the Establishment Clause and significantly curtailed traditional

school district discretion in defining the scope, content, and structure of its curricula as they relate to officially approved student activities.

Under the EAA, a public secondary school which receives federal funds and has a "limited open forum" may not deny access to school premises for meetings by noncurriculum-related, student-initiated groups on the basis of the "religious, philosophical, or other content of the speech at such meetings." A limited open forum exists under the Act "whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b).

While the statute does not expressly define "noncurriculum related," the meaning of the term can readily be discerned from the legislative history. First, Congress did not require public secondary schools to create limited open forums. It left that determination to the discretion of school authorities. Second, Congress granted a right of equal access only if school authorities actually established a limited open forum. The congressional aim was to assure nondiscriminatory access by noncurriculum-related student groups, including student religious groups, to an established open forum. Third, while the congressional floor debates do contain particular legislators' assessments as to whether specific activities are curriculum or noncurriculum-related, the legislative history as a whole demonstrates that Congress was not attempting to supplant the traditional discretion of school authorities in defining a school's curriculum.

The Eighth Circuit misread congressional intent when it gave binding effect to an individual legislator's personal laundry list of curriculum and no icurriculum-related activities instead of recognizing that the classification of activities is a case-by-case factual determination based on the degree of official sponsorship and direction of each activity. Unlike the district court in this case and the Ninth Circuit in *Garnett* v. *Renton Area School District No.*

403, 874 F.2d 608 (9th Cir. 1989), the court of appeals erroneously based its classification on whether an activity has a counterpart in the school's formal course curriculum.

Moreover, the Eighth Circuit's construction raises unnecessary constitutional concerns. By defining "noncurriculum related student groups" in terms of relationship to the formal course curriculum rather than faculty sponsorship and involvement in the activity, the court of appeals created an untenable constitutional dilemma for schools, such as the Westside High School in this case, which maintain a policy of faculty sponsorship and control over all student activities. At such schools, the student body well understands that the activities program is sponsored and controlled by the school administration, and the admission of a student religious group to the activities program creates the reasonable inference that the religious club, like other student clubs, has official approval and endorsement. Such official endorsement of a religious activity, however, is prohibited by the Establishment Clause. *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. ___, 109 S. Ct. 3086, 3101 (1989); *Lynch* v. *Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971).

Congress, to be sure, sought to minimize this risk of official involvement with student religious groups by confining the school administration's role to custodial supervision. *See* 20 U.S.C. § 4071(c)(3). But in the face of a statute whose aim is equal access—that is, access for religious groups on the same terms and conditions as other nonreligious, noncurriculum-related student groups—the conclusion is inescapable that a religious activity will be reasonably understood to have the same official imprimatur that the other approved student activities have at Westside High School.

ARGUMENT

I.

THE EAA DOES NOT SUPPLANT SCHOOL AUTHORITY DISCRETION IN DEFINING PUBLIC SECONDARY SCHOOL CURRICULA OR THE RELATIONSHIP BETWEEN THOSE CURRICULA AND OFFICIALLY SANCTIONED STUDENT ACTIVITIES.

In its decision below, the court of appeals concluded that Westside High School authorities had created a "limited open forum" for purposes of the EAA[1] by maintaining "many [noncurriculum related] student clubs at WHS, including the chess club. . . ." Pet. App. A at 14.[2] In reaching this conclusion, it rejected the school board's contention, upheld by the district court, that "those clubs which are currently permitted to utilize the facilities at Westside High School are curriculum related and tied to the educational function of the institution" (Pet. App. B at 25-26), and that the school had not created nor intended to create a limited open forum (Pet. App. A at 11-12). By rejecting these crucial findings, the court of appeals substituted its judgment on the nature of Westside High School's student activities program and held that the school had improperly refused to grant "equal access or a fair opportunity" to students seeking formal recognition of a Bible Study Club. The court reached this conclusion by

1. The EAA provides in relevant part:

> (a) Restriction of limited open forum on basis of religious, political, philosophical, or other speech content prohibited
>
> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings.
>
> (b) "Limited open forum" defined
>
> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

20 U.S.C. § 4071(a)-(b).

2. "Pet. App." refers to the appendices to the Petition for Writ of Certiorari.

selectively examining the statute's legislative history and concluding that Congress intended the term "noncurriculum related student groups" to encompass a broad range of activities regardless of the particular school's policy or practice toward student activities or the degree of faculty involvement in sponsoring and administering those activities.

The Eighth Circuit's construction of the statute misreads congressional intent and places school districts in an educational straightjacket by failing to recognize that public schools carry out their curricular mission not merely in the formal classroom setting, but also in the informal setting of student activities. By quoting in isolation one senator's attempt to illustrate which activities are curriculum-related and which are not, the court appeared to adopt the simplistic notion that only activities linked to a formal course were to be classified as curriculum-related. One effect of the court of appeals' decision will be to place at risk public schools which approve innovative or experimental student activities which have no precise counterpart in the formal education course materials. The risk is that their innovative activities programs may be deemed to constitute limited open forums, even though the school did not intend to establish such forums. The court overlooked the recurrent themes in the legislative history (1) that discretion to define the scope of the curriculum was retained by the school authorities, (2) that schools were free to establish or terminate a limited open forum, and (3) that the classification of an activity as curriculum or noncurriculum-related was based on the nature of faculty sponsorship and direction of the activity.

A. Congress Defined Noncurriculum-Related Student Activities as Those Which Lack Official Sponsorship or Direction.

The structure and legislative history of the Act demonstrate that Congress never intended to limit a school's discretion in defining its curriculum or to impose conditions upon any school using nonformal or nontraditional educational methods. Although the term "noncurriculum related student group" is not

expressly defined in the statute,[3] the legislative history provides clear guidance for defining the term. Senator Hatfield, the sponsor of the floor amendment that ultimately became the EAA, indicated that the classification of an activity as curriculum or noncurriculum-related depended on existence of faculty sponsorship, direction and supervision of the activity. In response to a question from Senator Gorton, Senator Hatfield agreed that, "if the school district were to determine that the girls cheerleading squad . . . should be led by a teacher, it could make the determination that it was curriculum-related." 130 Cong. Rec. S8342 (daily ed. June 27, 1984). In further response to Senator Gorton, Senator Hatfield agreed that the football team also was curriculum-related because "[t]he coaches are hired by the school administration" and they often "teach health classes" as members of the physical education department. *Id.* Other examples of curriculum-related activities mentioned by Senator Hatfield were a French or Spanish club, a drama club, and a school band. *Id.*

Senator Gorton then asked whether a key for distinguishing between curriculum and noncurriculum-related activities is school sponsorship.[4] Senator Hatfield agreed, explaining that sponsorship refers to "official participation, . . . the directing of that activity, and the leading of that activity, and the orchestrating of that activity." *Id.*

It is true, as the court of appeals noted (Pet. App. A at 13-14), that Senator Hatfield described a chess club as noncurriculum-

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3. Arguably, the text of the EAA does provide some guidance as to what constitutes a "noncurriculum related" student group. A school will be deemed to "offer a fair opportunity" for a noncurriculum-related group to meet, which thereby triggers the Act, if the meeting is voluntary and student-initiated and there is no sponsorship of the meeting by the school, the government, or its agents or employees. 20 U.S.C. § 4071(c)(1)-(2). Thus, a limited open forum could exist only where the existing student activities are voluntary and student-initiated and enjoy no school or government sponsorship. Otherwise, access under the Act would be unequal, rather than equal, access as intended by Congress.

4. "It seems to me, and I wish the Senator would correct me if I am in error, that one of the keys to the noncurriculum-related student organization is that it is not sponsored by the school." 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton).

related, but the colloquy with Senator Gorton demonstrated that what is dispositive is not whether the activity has a direct counterpart in the formal curriculum of the school, but whether the school assigns a faculty member or school employee to participate in the activity beyond a custodial role. 130 Cong. Rec. S8342-43. Indeed, Senator Hatfield acknowledged this with respect to all noncurriculum-related activities—nonreligious as well as religious. *Id.* at S8343.

The Senate debate plainly demonstrates that no bright lines exist and that the relationship of various student activities to a school's curriculum depends upon the particular facts of the school. A chess club, for example, may have as much of a relationship to mathematics or science as a football team or cheerleading squad has to physical education. It may be no more or less voluntary. It may have no more or less the imprimatur of school sponsorship, especially if the young chess players represent their schools in interscholastic competition.[5]

Thus, the court of appeals was plainly wrong in relying on Senator Hatfield's *ad hoc* classification of a hypothetical chess club in its characterization of the Westside High School chess club and in ignoring the classification standards Senator Hatfield expressed. The district court, after receiving testimony from school officials, found that

> the facts do not establish that WHS has a policy or practice of "indiscriminate use" of its facilities by student organizations or the general public. In fact, WHS has only sparingly permitted, outside of the classroom setting, the use of school facilities for political, social or economic discussions. The Court is convinced that those clubs which are currently permitted to utilize the facilities at WHS are curriculum related and tied to the educational function of the institution.

Pet. App. B at 25-26. The court also found that each activity had an official faculty sponsor who received remuneration for the service (Pet. App. B at 22-23) and that all clubs were subject to an official policy under which the school administration retained control over the activity (Pet. App. B at 19-20).

In sum, the court of appeals simply disregarded as irrelevant the trial court's findings on the degree of faculty sponsorship of the Westside High School student activities program and instead adopted its own bright line rule in which an activity is deemed to be curricular only if the activity corresponds to specific classroom subject matters. This construction flatly contradicts the structure, purpose, and legislative history of the statute.

B. The EAA Does Not Require Public Secondary Schools To Become Limited Open Forums.

The EAA does not force schools to become limited open forums, and Congress did not envision that public forums would be created in all schools. Senator Hatfield stated:

> [A] school retains control over the programs of that school, the activities of that school, the student body of that school. . . .
>
> We are not directing the school to set up such a forum. We are merely recognizing that schools do have them in many instances. Not all, as some schools do not have these open forums. For those that do have, what we are saying is that once this school establishes that forum, . . . it should not discriminate as to the content of the speech in that forum.

130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).[6] The Senate Committee Report states that the

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5. As the district court in *Garnett* stated:

> A school board . . . may determine that there is high student interest in a chess club, that it would be a good companion to a mathematics course, that such a club meets instructional goals, and as a result adopt it as part of the curriculum. The process of designing a curriculum of academic and nonacademic elements to meet educational objectives and foster student interest in the school and its courses of study is the prerogative of educators with their expertise and circumspection.

Garnett v. *Renton School Dist. No. 403*, 675 F. Supp. 1268, 1273 (W.D. Wash. 1987), *aff'd*, 874 F.2d 608 (9th Cir. 1989).

6. *See also* 130 Cong. Rec. S8357 (daily ed. June 27, 1984) (statement of Sen. Durenberger) ("The Equal Access Act retains local school board control over its schools. The school board determines whether it will create a limited

aim is to allow "students to engage in religious speech during extracurricular hours, if other students are allowed to engage in non-religious speech." S. Rep. 357, 98th Cong., 2d Sess. 2379 (1984).

The court of appeals misunderstood this fundamental aspect of the statute because it mistakenly believed that an expansive interpretation of "noncurriculum related" was necessary to prevent circumvention of the statute "by administrative decree" (Pet. App. A at 14). The goal of the statute, however, was not to license student expression—religious or otherwise—or to restrict school discretion in establishing a limited open forum. *See* 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984) (statement of Sen. Hatfield). As stated above, the statute's aim was to require a policy of nondiscrimination based on the content of the expression where the school had elected to allow student-initiated expression free of faculty sponsorship or direction. *Id.* The trigger for establishing that forum was left entirely in the hands of the school administration. Congress did not create, nor did it intend to create, a laundry list of the types of student activities which schools could not include in their curricula at the risk of establishing an unwanted open forum.[7]

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open forum by allowing student-initiated groups to meet on school premises."); 130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Dixon) ("The amendment specifies that the equal access provision would be applicable only in cases where a school generally allows nonreligious student groups to meet during noninstructional time."); 130 Cong. Rec. H7738 (daily ed. July 25, 1984) (statement of Rep. Darden) ("[The bill] retains local school board control over school activities by allowing local officials to decide whether, when, and how all groups may use school facilities. . . .").

7. The broad discretion of the schools to determine the content of their curricula has been recognized repeatedly by this Court. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *University of California Regents* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.). Thus, this Court has affirmed the school's authority over nontraditional forms of education such as student newspapers (*Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988) ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.")) and student body elections assemblies (*Bethel School District No. 403* v. *Fraser*, 478 U.S. 675, 683 (1986)).

The proper judicial role has nothing to do with policing school district policies to prevent circumvention of the Act since Congress expressly reaffirmed the right of school districts to establish open forums if they wished or to terminate those already in existence. There is no statutory policy favoring access by religious clubs to student activities programs; the statutory policy is simply one of nondiscrimination if the school elects to establish a forum. The courts play no role in that election other than to assure that the school's classification is consistent with the statutory criteria and not an abuse of discretion.

Curricular activities can take the form of formal or nonformal education, in or out of a classroom, using traditional textbooks or nontraditional methods such as electronic media. Surely, when a school offers after-hours "mini-courses," internships or work-study to accommodate students' specialized needs or interests, it is not operating outside what it sees as its curricular mission. To hold otherwise would have a chilling effect on the school's willingness to experiment with nontraditional or nonformal education, however innovative or beneficial to students.

C. The Westside High School Activities Program Does Not Establish An Open Forum.

The legislative history of the EAA indicates that Congress modeled the statute on the First Amendment right of access recognized in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Congress, in the EAA, sought to extend the *Widmar* rule, which is applicable to public universities, to public secondary schools. Nothing in the statute, however, alters the principle in *Widmar*, 454 U.S. at 267-70, and *Perry Education Association* v. *Perry Local Educators' Association*, 460 U.S. 37, 47 (1983), that the establishment of an open forum is the result of a voluntary act by the school authorities which those authorities also may discontinue. Indeed, Senator Hatfield explained in floor debate that Congress, in drafting the EAA, "used the phraseology that has been used by the courts and educational institutions to circumscribe what would be called a limited forum. We have used the

term 'limited forum' borrowing that from the courts." 130 Cong. Rec. S8342 (daily ed. June 27, 1984). Under the EAA, *Widmar* applies to the Westside High School only if the high school, like the university in *Widmar*, established a public forum.

The Court in *Widmar* reviewed findings that a state university had enacted a policy of "accommodating" student groups (454 U.S. at 267), and recognized more than 100 such groups. On these facts, it concluded that the university had created a limited open forum, and thus was required to show a compelling interest for excluding a religious student group from access to school facilities. *Id.* at 269-70.

The Ninth Circuit in *Garnett* v. *Renton Area School District No. 403*, 874 F.2d 608 (9th Cir. 1989), used the same analysis, but distinguished *Widmar* on its facts. It made a specific inquiry into the facts and circumstances surrounding a school administration's policy that only "[c]lubs which were an extension of the courses and programs of the district are permitted to meet" (*Garnett*, 874 F.2d at 613), and found, on the basis of the specific factual record before it, that the school's policy "does not discriminate on an impermissible basis, nor is it irrational. Nor do we find that the district has been disingenuous in the application of the policy." *Id.*[8] In particular, it found that the degree of faculty involvement, direction and supervision was such that the activities would not be deemed student-initiated or student-directed. *Id.* at 614.

In the present case, as well, review of the record shows the facts to be wholly distinguishable from those of *Widmar*. The district court made numerous findings on the extent of faculty participation and supervision, as well as each activity's role in furthering the school's curricular goals. Pet. App. B at 20-23.

8. The court's review of the school's determinations was not *de novo*, since such review, it believed, would invite litigation every time a student group was denied a classroom, and, in any event, is not necessary to effectuate the purposes of the EAA. *Garnett*, 874 F.2d at 613-14. It noted that courts have deferred to school authorities' broad discretion in shaping the school environment and that the EAA does not expressly depart from this principle. "Congress must, therefore, be understood to have legislated in light of this principle." *Id.* at 614. The court found nothing in the legislative history to contradict this interpretation.

Both *Widmar* and the EAA require a case-by-case analysis to ensure that schools have properly balanced the competing constitutional interests without supplanting or severely curtailing the traditional responsibility of school authorities to manage their schools and define their educational goals. The Eighth Circuit's laundry list approach, by contrast, fails to take into account the unique factual circumstances of a particular school's curricular mission. Such an approach "make[s] the EAA meaningless" (Pet. App. A at 12) only insofar as the language of the Act itself and the lengthy legislative history stress repeatedly that the Act does not force a school to become a forum where none is intended.

II.

THE COURT OF APPEALS' CONSTRUCTION OF THE EAA UNNECESSARILY RAISES CONSTITUTIONAL CONCERNS UNDER THE ESTABLISHMENT CLAUSE.

The construction of the EAA which we urge offers the additional advantage of avoiding unnecessary constitutional concerns. This Court has repeatedly favored a fair construction of a federal statute which avoids serious doubt about the statute's constitutionality to one which raises serious constitutional doubt. *See, e.g.*, *Public Citizen* v. *Department of Justice*, 491 U.S. ___, 109 S. Ct. 2558, 2572 (1989); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979). The court of appeals, on the other hand, disregarded that "cardinal principle" (*Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)) and instead adopted a construction that unnecessarily required the court to address the constitutionality of the EAA under the Establishment Clause.

We are satisfied that the statute is not unconstitutional on its face, since it can be applied in a manner consistent with all three First Amendment clauses involved in this case. If a school district truly establishes a limited open forum, no serious constitutional objection can be raised when a student group exercises its right of fair access to the school's student activity program for such non-religious activities as Young Democrats or Young Republicans, Boy Scouts, 4-H, or Future Farmers of America. We are also

satisfied that even a student religious group may obtain access to a public secondary school student activities program which is wholly free of official sponsorship and direction without raising Establishment Clause concerns. That is the issue this Court settled in *Widmar*.

The court of appeals in this case, however, as noted above, overlooked the crucial factual distinction between *Widmar* and this case, which the district court correctly identified as dispositive—that is, that the Westside High School student activities program is not free of official sponsorship and direction. *See* Pet. App. B at 21-23.[9] The involvement of paid faculty sponsors and official direction and control of all student activities at Westside High School presents very different circumstances from the forum in *Widmar* which the university opened for use by student groups. *See Widmar*, 454 U.S. at 273. There was no risk that the religious group seeking access to the university facility in *Widmar* would be perceived as officially sponsored because there was no reason to believe that other nonreligious activities using the forum received official approval. *Id.* at 274.

If the court of appeals had construed the eligibility standard for equal access under the statute by reference to the degree of official sponsorship or involvement in the existing activities as the legislative history calls for, there would be no risk of perception that any noncurriculum-related student activity, including student religious groups, enjoyed faculty sponsorship. Given the absence of any reasonable perception of official endorsement of student activities, there would be no basis for Establishment Clause concern. *County of Allegheny* v. *American Civil Liberties Union*, 492 U.S. ___, 109 S. Ct. at 3101; *Lynch* v. *Donnelly*, 465 U.S. at 687 (O'Connor, J., concurring).

A different case is presented where, as here, faculty sponsorship and control of student activities is the norm. The court of appeals

9. The only distinction acknowledged by the court of appeals was the fact that *Widmar* involved a public university and the EAA concerns public secondary schools. The court determined this difference to be of no consequence. Pet. App. A at 19. It would be unnecessary for this Court to address the constitutional significance of that difference under our construction of the EAA.

believed this arrangement did not prevent the establishment of a limited open forum to which student religious groups were entitled to equal access. Pet. App. A at 14-15. But in this circumstance, students are accustomed to associating the activities program with official approval and direction. Therefore, the risk of reasonable inference[10] that a religious activity enjoys the same official imprimatur as other student activities is not insignificant and presents substantial constitutional concerns. *County of Allegheny*, 492 U.S. ___, 109 S. Ct. at 3086; *Lemon* v. *Kurtzman*, 403 U.S. at 612-13.

The statute, of course, is concerned with "equal access" for religious groups—that is, access for religious groups on the same terms and conditions as other student groups. A secondary school can avoid such Establishment Clause problems only when a truly open forum is maintained at the school, meaning that no student could reasonably perceive that the school sponsored or promoted either a student religious group or a nonreligious group.

The evidence in this case is undisputed that the student religious group here is not seeking equal access to the forum open to all other student clubs, but a different form of access free of faculty direction and guidance applicable to all other student activities. In such a case, the benefit to religion is more than incidental and raises serious Establishment Clause concerns by allowing the student religious group to obtain access on terms available to no other group. *See Widmar*, 454 U.S. at 275-76.

Most importantly, when Westside High School refused to sponsor the student religious group as an approved student activity, the school was denying the students neither their First Amendment right of free speech (*see Tinker* v. *Des Moines School Independent Community District*, 393 U.S. 503, 506-07 (1969)) nor their First Amendment right to freely exercise their religious beliefs (*see Wallace* v. *Jaffree*, 472 U.S. 38, 67 (1985)

10. A mere "reasonable inference" that Westside High School supports a student religious group is sufficient to raise Establishment Clause questions. *See Widmar*, 454 U.S. at 274, n.14. *Cf. Hazelwood*, 484 U.S. at 271 (holding that the educator may exercise authority over student publications which "might reasonably perceive to bear the imprimatur of the school.").

beliefs (*see Wallace* v. *Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring)). The students, in fact, *had* been meeting informally without school interference to conduct the very activity they demanded that Westside High School approve. Whether students may engage in prayer, either individually or in groups, is simply not the issue pursued by the students in this case. It is clear that the students seek the stamp of official approval of their religious activity by Westside High School. The Eighth Circuit's decision in essence forces Westside High School to give such approval to the student religious group.

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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13

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No. 88-1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,

Petitioners,

v.

BRIDGET MERGENS, et. al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENTS

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15 pp

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
ARGUMENT	2
I. THE FIRST AMENDMENT PERMITS THE STUDENTS TO MEET ON CAMPUS, REGARDLESS OF WHETHER THE PUBLIC SCHOOL MAINTAINS AN OPEN FORUM	2
A. Tinker Established A Right To Student Speech In Non-Open Forum Settings Within The Public School	3
II. THE STUDENTS HAVE THE RIGHT TO MEET UNDER THE FREE EXERCISE CLAUSE	7
A. The School Officials Violated The Students' Free Exercise Rights By Forbidding The Bible Study Club	7
B. The School Is Not Permitted To Prohibit The Student Meeting, On The Claim That They Can Meet Elsewhere	8
C. School Accommodation Of The Student Bible Study Would Not Violate The Establishment Clause	9
CONCLUSION	11

TABLE OF AUTHORITIES

CASES:	Page
Bethel School District No. 403 v. *Fraser*, 478 U.S. 675 (1986)	6
Burch v. *Barker*, 861 F.2d 1149 (9th Cir. 1988)	4
Consolidated Edison v. *Public Service Commission*, 447 U.S. 530 (1980)	8
Grayned v. *City of Rockford*, 408 U.S. 104 (1972)	8
Hazelwood School District v. *Kuhlmeier*, 484 U.S. ___, 98 L.Ed.2d 592 (1988)	5
Hobbie v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987)	9
Lynch v. *Donnelly*, 465 U.S. 668 (1984)	9
McDaniel v. *Paty*, 435 U.S. 618 (1978)	10
Schneider v. *State*, 308 U.S. 147 (1939)	8
Sherbert v. *Verner*, 374 U.S. 398 (1963)	7
Southeastern Promotions Ltd. v. *Conrad*, 420 U.S. 546 (1975)	9
Spence v. *Washington*, 418 U.S. 405 (1974)	8
Thomas v. *Review Board*, 450 U.S. 707 (1981)	7
Tinker v. *Des Moines Community School District*, 393 U.S. 503 (1969)	*passim*
U.S. v. *Lee*, 455 U.S. 252 (1982)	7
Widmar v. *Vincent*, 454 U.S. 264 (1981)	2, 3, 11
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	7
Witters v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986)	2
Zorach v. *Clauson*, 343 U.S. 306 (1952)	11

STATUTES:	
20 U.S.C. § 4071	2

U.S. CONSTITUTION:	
First Amendment, Free Speech Clause	*passim*
First Amendment, Free Exercise Clause	*passim*
First Amendment, Establishment Clause	*passim*

OTHER AUTHORITIES:	
Islam, 22 Encyclopedia Britannica: Macropedia 1, 13 (15th ed. 1985)	10

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BRIEF AMICUS CURIAE OF CONCERNED WOMEN FOR AMERICA IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS IN THIS CASE

Concerned Women for America (CWA) is a national, nonprofit organization representing approximately 600,000 people. The purpose of Concerned Women for America is to preserve, protect and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid, and related activities. Lawyers for CWA have appeared

before this Court representing the successful petitioner in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986), as well as in many amicus briefs.

CWA's position on equal access, which is like that of many other religious and secular organizations, is as follows:

> We believe that the nation's public schools must once again respect equally the rights of students and teachers who have religious beliefs along with those who do not. The right to voluntarily pray, read the Bible, or meet for religious discussion is necessary to achieve such equal treatment . . . . We continue to support the principle of equal access for religious student groups and call for vigorous enforcement of the law in this regard.

During 1984, CWA publicly supported the Equal Access Act, which did become law (20 U.S.C. § 4071 et seq.) and is at issue in this case. CWA supports the student-respondents in this case, and urges this Court to affirm the ruling of the Eighth Circuit in this case. 867 F.2d 1076 (8th Cir. 1989).

ARGUMENT

I. THE FIRST AMENDMENT PERMITS THE STUDENTS TO MEET ON CAMPUS, REGARDLESS OF WHETHER THE PUBLIC SCHOOL MAINTAINS AN OPEN FORUM

The Eighth Circuit ruled correctly in this case that the high school maintained an open forum, and therefore, the students who wanted to meet to study the Bible and pray could not be denied access to school facilities simply because of their religious beliefs and practices. The Eighth Circuit applied the obvious precedent of *Widmar* v. *Vincent*, 454 U.S. 264 (1981) in reaching its decision.

The Eighth Circuit saw this as a free speech case, coming under the "open forum" aspect of the Free Speech Clause.[1]

Although the school in this case did operate an open forum, this Court can rule in favor of the students, based on the students' First Amendment rights, with no reference to the open forum doctrine. Amicus Concerned Women for America argues that the students have a right under the Free Speech Clause and the Free Exercise Clause to meet on school property, apart from their right to meet under the "open forum" aspects of the First Amendment.

In other words, two kinds of First Amendment rights are at issue in this case. One is the *Widmar* "equal access-open forum" right. The other is the *Tinker* right of student expression in the public schools. Concerned Women for America argues that public schools have a constitutional duty to permit student religious meetings, regardless of whether the school is an open forum, unless those meetings would materially and substantially disrupt the functioning of the school, which is a rare situation.

A. Tinker Established A Right To Student Speech In Non-Open Forum Settings Within The Public School.

It is important to underscore that the constitutional rights of students to free expression in the public schools exist *independent* of the open forum doctrine. This Court has never limited student expression rights *solely* to the context of an open forum in a public school.

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[1] 867 F.2d at 1078-1080.

For example, in *Tinker* v. *Des Moines Community School District*, 393 U.S. 503 (1969), this Court ruled that high school officials could not stop students from wearing black armbands to school to protest the Vietnam War, unless the armband-wearing "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 393 U.S. at 513. In that important case, this Court found that students have a right to expression under the Free Speech Clause, without any discussion of the open forum doctrine. Indeed, the high school hallways and classrooms in *Tinker* clearly were not open forums, yet students still have protected rights to expression in those places.[2]

Tinker did not limit its holding to student self-expression (e.g., the wearing of armbands, buttons, etc.), but extended the holding to include students meeting with other students for expressive activities:

> The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. *Among those activities is personal intercommunication among the students*. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if

[2] The Ninth Circuit followed the *Tinker* decision recently when it ruled that high school students have a First Amendment right to distribute a non-school-sponsored "underground" newspaper to their fellow students, and to avoid predistribution review by school officials. *See Burch* v. *Barker*, 861 F.2d 1149 (9th Cir. 1988). The Ninth Circuit rooted its decision in *Tinker*, not in the open forum doctrine.

> he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school," and without colliding with the rights of others.

393 U.S. at 513.

The rights outlined by this Court in *Tinker* apply to groups of students, as well as individual students. It makes no difference whether a public school is an open forum or not. If students desire to meet in small groups to discuss topics of mutual interest, school officials must accommodate their free speech rights, unless the student meeting would materially and substantially interfere with the operation of the educational process in the schools.

Later Supreme Court decisions have not cut back on this broad definition of student expressive rights in the public schools. In *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. ___, 98 L.Ed.2d 592 (1988), this Court allowed school officials to edit and eliminate student-written stories from the high school newspaper. This Court clearly stated that the issues in *Hazelwood* differed sharply from the issues in *Tinker*. This Court said:

> *[Tinker]* addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. *[Hazelwood]* concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

98 L.Ed.2d at 605.

This Court in *Hazelwood* said that school officials may restrict student speech that is *school-sponsored*, but that the *Tinker* standards apply for student speech that is not school-sponsored:

> Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

98 L.Ed.2d at 606.

The students here, as in *Tinker*, do not hold meetings that are "school-sponsored." They seek a place on campus to meet and share their thoughts and ideas on their common religious beliefs. Accommodation of their desire to meet is no more government endorsement of religion, than was accommodation of Tinker's armband government endorsement of the anti-Vietnam War movement.

Similarly, in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), this Court reaffirmed the principles of *Tinker*, but said they did not apply in that case.[3] This Court approved the school's punishment of a student for his nominating speech endorsing another student. This Court focused on the fact that the speech was filled with sexual innuendo and vulgarity, and that the student spoke at a school-sponsored forum.

These two later cases do not undercut *Tinker*, but merely clarify that *Tinker* refers to student speech not sponsored by the school. Applying the *Tinker* standard to the case at bar, the school must permit the students' Bible study, because it is not school sponsored and because it

[3] 478 U.S. at 680.

does not materially or substantially disrupt the educational process.

II. THE STUDENTS HAVE THE RIGHT TO MEET UNDER THE FREE EXERCISE CLAUSE

A. The School Officials Violated the Students' Free Exercise Rights By Forbidding The Bible Study Club.

The students have the right to meet under the Free Exercise Clause, as well as the Free Speech Clause. This Court has stated the test to evaluate cases under Free Exercise Clause as that the students must show that their beliefs are sincere and rooted in religion,[4] and that their beliefs are burdened by the government's actions.[5] The government then must show that its burden on the religious beliefs is "essential to accomplish an overriding governmental interest,"[6] and is the least restrictive means to meet that interest.[7]

The students in this case have religious beliefs about meeting together after school hours on school grounds for a Christian Bible Study Club.[8] The school officials refused to permit the student club to meet.[9] The school's actions burdened the Free Exercise rights of the students.

[4] *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972).

[5] *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963).

[6] *U.S.* v. *Lee*, 455 U.S. 252, 257 (1982). In *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972), this Court characterized the compelling state interest requirement this way: "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to free exercise of religion."

[7] *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981).

[8] 867 F.2d at 1077.

[9] *Id.*

The school here can only offer two arguments to justify its burden on the students' rights, and both arguments fail to support the school: the student's religious beliefs are not burdened, because they can meet off-campus, and allowing the student meetings would violate the Establishment Clause.

B. The School Is Not Permitted To Prohibit The Student Meeting, On The Claim That They Can Meet Elsewhere.

The school district cannot prohibit the students from meeting for Bible study on campus by claiming that they could meet elsewhere. First, the school district did not demonstrate that other suitable facilities exist.

Second, even if other facilities did exist, their existence is constitutionally irrelevant. It is well-settled that the government cannot deny a person his constitutional rights merely because he could exercise them somewhere else. In *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972), this Court quoted an earlier case to reiterate:

> It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

408 U.S. at 119 n. 40, quoting *Schneider* v. *State*, 308 U.S. 147, 163 (1939).[10]

In *Consolidated Edison* v. *Public Service Commission*, 447 U.S. 530 (1980), this Court said:

> We have consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression.

[10] *See also Spence* v. *Washington*, 418 U.S. 405, 411 n. 4 (1974).

447 U.S. at 541, n. 10.

In *Southeastern Promotions Ltd.* v. *Conrad*, this Court faced the argument that a municipal auditorium could deny use for a production of the play, "Hair," because other facilities existed for the play. This Court rejected that argument:

> Whether petitioner might have used some other, privately owned, theater in the city for the production is of no consequence . . . . One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

420 U.S. at 556.

Therefore, the school district cannot deny access for the student Bible Club on the ground that the students might be able to meet somewhere else.

C. School Accommodation Of The Student Bible Study Would Not Violate The Establishment Clause.

This Court has ruled that government has a "duty to *accommodate*" religious beliefs and practices, and that such accommodation does not result in unconstitutional *endorsement* of religion, in violation of the Establishment Clause. In *Lynch* v. *Donnelly*, 465 U.S. 668 (1984), the majority said:

> [The First Amendment] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

465 U.S. at 673.

In *Hobbie* v. *Unemployment Appeals Commission*, 480 U.S. 136 (1987), this Court repeated that concept:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

480 U.S. at 144.

The school district misunderstands this crucial point of law, because it deems any accommodation of student religious activities to violate automatically the Establishment Clause. This is clearly not the law.

For example, a group of devout Moslem students might enroll at the high school in this case. One of the five major tenets of Islam requires all Moslems to pray facing Mecca five times a day.[11] One of those times falls within the school day (prayer required immediately after noon).[12] If the Moslem students ask school officials for a secluded spot in the school where they may unroll their prayer rugs and pray to Allah, the school district certainly would not violate the Establishment Clause by accommodating their Islamic beliefs. Yet, in this case, the school district's extreme position would compel it to prohibit the Moslem students from meeting, claiming the accommodation of their prayers would violate Establishment Clause. No part of the Constitution and no decision of this Court demands such a harsh response to student religious expression.

This Court has cautioned officials not to use the Establishment Clause as an excuse to justify mistreatment of religious people. In *McDaniel* v. *Paty*, 435 U.S. 618 (1978), this Court struck down an exclusion of ministers

---

[11] *Islam*, 22 Encyclopedia Britannica: Macropedia 1, 13 (15th ed. 1985).

[12] *Id.*

from state offices. Justice Brennan, in his concurring opinion, said:

> The Establishment Clause, properly understood, is a shield against any attempt by government to inhibit religion as it has done here [citations omitted]. It may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

435 U.S. at 641. He added:

> The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore, subject to unique disabilities.

Id.

The school district's actions, in effect, interpret the Establishment Clause mandate too harshly, by erroneously showing "callous indifference" toward religious groups. *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952). This is not what the Establishment Clause requires. School district accommodation of the Christian students' religious practices does not violate the Establishment Clause. The school district does not endorse the students' religious beliefs merely by allowing them to meet.

CONCLUSION

The Eighth Circuit correctly ruled that the high school in this case operated an open forum, and that the students should be allowed to meet to study the Bible under the Equal Access Act and the First Amendment's open forum doctrine, enunciated in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Even if the school did not operate an open forum, the students also have a right to meet under First Amendment principles of *Tinker* v. *Des Moines School District*,

393 U.S. 503 (1969). Concerned Women for America urges this Court to affirm the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

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No. 88-1597

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, by and through her next friend, DR. DANIEL N. MERGENS, *et al.*,
Respondents,

UNITED STATES OF AMERICA,
Respondent,

KENDRA K. KELLISON, etc., by and through her next of friends, VICTOR KRAATZ and LINDA KRAATZ, *et al.*,
Respondents,

MATT SCHULZ, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. WESTSIDE SCHOOL DISTRICT'S POLICY OF PREVENTING RELIGIOUSLY-AFFILIATED GROUPS FROM USING THE LIMITED OPEN FORUM PROVIDED BY THE HIGH SCHOOL VIOLATES THE EQUAL ACCESS ACT 3

II. THE EQUAL ACCESS ACT DOES NOT VIOLATE THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE . . . 5

III. EVEN IF THE EQUAL ACCESS ACT IS UNCONSTITUTIONAL OR DOES NOT APPLY, ALLOWING THE BIBLE CLUB TO MEET WOULD SATISFY CONSTITUTIONAL STANDARDS 8

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: Page

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 10, 11

Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982) 9

Burnside v. Byars, 363 F.2d 744 (1966) 9

Carey v. Brown, 447 U.S. 455 (1980) 10

Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 3

Everson v. Board of Education, 330 U.S. 1 (1947) 13

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 9

Lemon v. Kurtzman, 403 U.S. 602 (1971) 2, 5, 6, 8

McDaniel v. Patti, 435 U.S. 618 (1978) 13

Meyer v. Nebraska, 262 U.S. 390 (1923) 9

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 9

Shelton v. Tucker, 364 U.S. 479 (1960) 9

Tinker v. Des Moines Community School District, 393 U.S. 503 (1969) 9

Widmar v. Vincent, 454 U.S. 263 (1981) . . 2, 5, 6, 8, 10, 11

Zorach v. Clausen, 343 U.S. 306 (1952) 13

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. I . . . . . *passim*

STATUTES:

20 U.S.C. §§4071- 4074 (1984) . . . . . *passim*

OTHER AUTHORITIES:

Webster's Ninth New Collegiate Dictionary, 316 (1984 ed.) 3

130 Cong. Rec. S8342 (daily ed. June 27, 1984) 4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Catholic League for Religious and Civil Rights is a non-profit voluntary association, national in membership, organized to promote goodwill and harmonious relations in the community, to combat all forms of religious prejudice and

discrimination, and to defend the rights and sanctity of each human life. The League has obtained written permission to file this brief from the counsel of record for the parties in this case. These letters have been filed with the Clerk of Court.

SUMMARY OF ARGUMENT

The Equal Access Act (20 U.S.C. §§4071-74 (1984)) (hereinafter the EAA) prohibits public secondary schools receiving federal funds from barring groups wishing to use school-provided limited open forums based on the religious or political content of the proposed group's speech. By allowing noncurriculum related student groups to use school facilities after school hours, Westside School District has created a limited open forum and, therefore, is subject to the EAA's provisions. Westside School District's policy, which prevents groups from using the limited open forum provided by the school if they are affiliated with a political or religious group, violates the EAA.

Any challenge to the constitutionality of the EAA based on the First Amendment's Establishment Clause must be rejected because the EAA satisfies all three prongs of the test enunciated by the Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Even if the Court rules that the Equal Access Act is unconstitutional, or that it does not apply in this case, religiously-oriented groups like the Bible club proposed by Ms. Mergens (hereinafter Bible Club) are constitutionally entitled to use a limited open forum provided by a secondary school under the standards set forth by the Court in *Widmar v. Vincent,* 454 U.S. 263 (1981). *Widmar* prohibits educational institutions from discriminating against groups which wish to use a limited open forum provided by schools based on the religious affiliation of the proposed group. A qualifying group may only be prevented from using a limited open forum if denying access to the group is the least restrictive means of furthering a compelling state interest. Because Westside

School District has not demonstrated that any compelling state interest is furthered by its policy banning religious groups and because, even if the school district has offered a compelling concern, it has not shown that its policy is the least restrictive means of accomplishing this goal, the school district's policy is unconstitutional.

ARGUMENT

I. WESTSIDE SCHOOL DISTRICT'S POLICY OF PREVENTING RELIGIOUSLY-AFFILIATED GROUPS FROM USING THE LIMITED OPEN FORUM PROVIDED BY THE HIGH SCHOOL VIOLATES THE EQUAL ACCESS ACT.

The EAA states in pertinent part:

> (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.
>
> (b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

Webster's Ninth New Collegiate Dictionary defines the word "curriculum" as: (1) the courses offered by an educational institution; (2) a set of courses constituting an area of specialization. If the statutory language is unambiguous, and if there is no clearly expressed legislative intent to the contrary, that language must ordinarily be considered to be conclusive. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). Nothing in

the EAA's language or legislative history expresses any Congressional intention that "noncurriculum related student group" be given anything other than its plain and ordinarily accepted meaning. Therefore, it is clear that student groups engaging in activities which are not directly related to courses offered by a secondary school are "noncurriculum related student groups" which, under the EAA, may not be excluded from a limited open forum because of the religious content of the group's speech.

Several of the approximately 30 student clubs which meet at Westside High School are "noncurriculum related student groups". For example:

— Subsurfers, a club designed for students interested in learning about skin and scuba diving, permits nonstudents to participate so they can obtain scuba certification. Because membership and participation in Subsurfers is not limited to the student body at Westside High School, and because Subsurfers is not related in any way to a course offered by the school, the inescapable conclusion must be that Subsurfers is a noncurriculum related student group.

— Interact is a service-oriented club related to Rotary International. Rotarians (adult members of the general public) occasionally attend Interact meetings. Membership in Interact is entirely voluntary; members receive no class credit for participating. Consequently, Interact — a group which has close connections with a national community service organization and is absolutely unrelated to any course offered at the high school — is also a noncurriculum related student group.

— The Chess Club is not affiliated with or related to any class taught at Westside High School. The legislative history of the EAA clearly indicates that a chess club is a "noncurriculum related student group" which falls within the coverage of the EAA. *See* 130 Cong. Rec. S8342 (daily ed. June 27, 1984). Therefore, because the Chess Club is not

directly related to any course offered by the high school, it is also a noncurriculum related student group.

Because Westside School District has authorized Subsurfers, Interact and the Chess Club — three noncurriculum related student groups — to use school property after regular school hours, it has created a limited open forum which is covered by the provisions of the EAA. Consequently, since the EAA explicitly forbids secondary schools which receive federal funds from discriminating against or denying access to a student group based on the religious content of the group's speech, Westside School District's refusal to allow the Bible Club to use the limited open forum provided by the school because of the group's religious speech violates the EAA.

II. THE EQUAL ACCESS ACT DOES NOT VIOLATE THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE.

When determining whether a statute or regulation violates the First Amendment's Establishment Clause, the constitutional analysis is controlled by the three-pronged test set forth by the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To satisfy constitutional standards, the statute in question must:

(1) Have primarily a secular purpose;

(2) Have a primary effect which neither advances nor inhibits religion; and

(3) Not foster excessive government entanglement with religion.

403 U.S. at 612-13.

The EAA satisfies all three prongs of the *Lemon* test. First, the purpose of any type of open or limited open forum is to foster the free exchange of ideas. *Widmar v. Vincent*, 454 U.S. 263, 272 n. 10 (1981). This is a perfectly legitimate and

laudable secular purpose. The fact that a forum is made available to all qualifying groups — regardless of a group's religious, political or secular orientation — effectively refutes any allegation that the statute was improperly designed to further religious concerns. Even though *Widmar* involved a university rather than a secondary school, the observation made by the Court in that case is equally applicable here:

> [B]y creating a forum the University does not thereby endorse or promote any of the particular ideas aired there. Undoubtedly many views are advocated in the forum with which the University desires no association.

454 U.S. 263, 272 n. 10.

In summary, because the EAA has a secular purpose — promoting the free exchange of ideas — the EAA satisfies the first prong of the *Lemon* test.

The EAA also satisfies the second prong of the *Lemon* test, which bars regulations having a primary effect of either advancing or inhibiting religion. The EAA clearly does not either advance or inhibit religious interests. Merely incidental religious benefits do not violate the Establishment Clause. 454 U.S. at 273. Because allowing the Bible Club to use the limited open forum provided by the school district would grant the club no special treatment or privileges denied to the other clubs eligible to use the forum, any benefits enjoyed by the Bible Club would be merely incidental and, therefore, would not violate the second prong of the *Lemon* test.

The school district argues that the EAA impermissibly advances religion because high school students will view the district's provision of a limited open forum at the school as a state endorsement or sanction of the views expressed therein. This argument lacks merit.

First, Westside School District's creation of a limited open forum for use by student groups makes it very similar to other

organizations which provide forums for public commentary. A newspaper which publishes its readers' opinions on its editorial page cannot fairly be accused of endorsing the viewpoints expressed therein. Similarly, broadcast stations which open their airwaves for public commentary are not charged with sharing the views expressed. Certainly, no one attributes to the state the views of people who take advantage of state-provided opportunities to exercise their First Amendment rights by picketing or marching on the streets, or by making their voices heard at legislative hearings. In none of these instances can organizations which provide a public forum fairly be accused of endorsing the ideas of those who choose to avail themselves of the opportunity for public expression.

Here, however, Westside School District argues that, if the district allows the Bible Club to meet on school premises, students will consider this to be a school sanction of religion. Generally, people do not attribute reader opinions on the editorial page in the newspaper, or listener comments on the airwaves, or those made before governmental bodies, to the respective organizations which provide these forums for public expression. It is reasonable to conclude that students will not assume that a school district — merely by providing a forum for public expression — endorses the views expressed therein.

It is also important to remember that the forum provided by the school district is open to all qualifying groups, both religious and nonreligious, political and nonpolitical. It is difficult to fathom how a school district can be charged with supporting the viewpoints of a group using a limited open forum when it affords other groups which may advocate an inconsistent — possibly even diametrically opposite — viewpoint the same opportunity for free expression in the same forum.

In summary, because the EAA does not impermissibly advance religion, it complies with the second prong of the *Lemon* test.

The EAA also satisfies the third prong of the *Lemon* test, which requires any regulation involving the state in an excessive entanglement with religion to be stricken. The EAA strives to avoid entanglement by making a limited open forum available to all qualifying groups — regardless of the religious or political agenda of the group using the forum. The Court observed in *Widmar* that an educational institution which attempts to enforce a policy hostile to religion becomes more entangled in religion than one which grants access to all qualifying groups, notwithstanding the religious nature of their speech. *Widmar*, 454 U.S. at 272, n. 11. Therefore, because the EAA was designed in part to avoid entanglement between secondary schools and the state, any claim that the EAA violates the Establishment Clause by excessively entangling the state in religion must be rejected.

Because the EAA does not involve the state in an excessive government entanglement in religion, it satisfies the third prong of the *Lemon* test.

The three-pronged test enunciated by the Court in *Lemon* controls the constitutional analysis of cases involving claimed violations of the Establishment Clause. Because the EAA satisfies all three prongs of the *Lemon* test, the EAA does not violate the Establishment Clause.

III. EVEN IF THE EQUAL ACCESS ACT IS UNCONSTITUTIONAL OR DOES NOT APPLY, ALLOWING THE BIBLE CLUB TO MEET WOULD SATISFY CONSTITUTIONAL STANDARDS.

Even if the Court decides that the Equal Access Act is unconstitutional, or that it does not apply in this case, allowing the Bible Club to use the limited open forum

provided at Westside High School comports with constitutional standards.

Local school boards are generally afforded broad discretion in managing school affairs. *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925). However, the Court, while noting that states and local school boards have considerable discretion in operating public schools, has recently observed:

> At the same time...we have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.

Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853, 864 (1982).

The importance of protecting constitutional rights inside the school setting has long been recognized by the Court. In *Shelton v. Tucker,* 364 U.S. 479, 487 (1960), the Court stated that it was more important to vigilantly safeguard constitutional freedoms in the schools than anyplace else. In *Tinker v. Des Moines Community School District,* 393 U.S. 503, 512 (1969), the Court described the classroom as a "marketplace of ideas" within which the free expression of various viewpoints was to be encouraged. Students have a right to express their opinions if they can do so without substantially interfering with the requirements of school discipline and without violating the rights of others. *Burnside v. Byars,* 363 F.2d 744, 749 (1966). In fact, it is clear that neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. 393 U.S. at 506.

Religious worship and discussion are forms of speech and association protected by the First Amendment. *Heffron v. International Society for Krishna Consciousness, Inc.,* 452 U.S.

640, 647 (1981). Nothing in the Establishment Clause requires the state to suppress a person's speech merely because the content of the speech is religious in character. *Bender v. Williamsport Area School District,* 475 U.S. 534, 552 (1986) (Burger, C. J., dissenting). The Court has expressly rejected the argument that the Establishment Clause requires schools to ban groups which would otherwise qualify from using an open forum merely because of the religious content of their proposed speech. *Widmar*, 454 U.S. at 270-71. In short, it is clear that religious speech and expression enjoy just as much First Amendment protection as any other form of speech.

In order to justify discriminatory exclusion from a public forum based on the religious content of a group's speech, the state (or any entity acting on its behalf) must show that the regulation is both absolutely necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown,* 447 U.S. 455, 461-62, 465 (1980); 454 U.S. at 270.

In *Widmar,* the Court held that a university had, by adopting a policy of opening campus facilities for use by student groups, created a limited open forum (the forum was a limited open, rather than a public, forum because it was available for use only by student groups). Once the school created a limited open forum, it was permitted to exclude a qualifying group from the forum on the basis of the content of the group's speech only if it could prove that the prohibition was necessary to further a compelling state interest and was the least restrictive means of accomplishing this. 454 U.S. at 267-68. In *Widmar,* the university failed to demonstrate that excluding a religiously-oriented group from its limited open forum was the least restrictive means of achieving a compelling state interest.

Bender involved a fact situation virtually identical to the one in *Widmar* except for one minor difference: the

educational institution seeking to prohibit students from using a limited open forum to meet for religious purposes was a high school — not a university. Although the majority in *Bender* avoided addressing the merits of that case by disposing of the appeal on procedural grounds, the four dissenting justices agreed that a high school which created a limited open forum was to be held to the same constitutional standard which was applied to a university in *Widmar*; a content-based exclusion of a group from a limited open forum was constitutionally permissible only if the school could show that the restriction was necessary to further a compelling state interest and was narrowly drawn to achieve that end. 475 U.S. at 553 (Burger, C. J., dissenting); 475 U.S. at 555 (Powell, J., dissenting).

The present case is analogous to *Bender.* In both instances, a school district which made a limited open forum available to other student groups unconstitutionally denied a student group use of the forum because of the religious content of the proposed group's speech. In *Bender,* the Court did not reach the merits; in this case, the Court has an opportunity to make a decision on the merits. Because Westside School District has failed to offer a compelling justification for banning the Bible Club and has not demonstrated that banning the Bible Club is the least restrictive means of advancing a compelling interest, the Court should rule that Westside School District has unconstitutionally prevented Mergens and her companions from exercising their right to meet in the limited open forum provided by Westside High School.

Westside School District has offered no compelling reason for denying access to the Bible Club. The high school defends its abridgement of Mergens' and her companions' constitutional rights by alleging that high school students will view a policy which permits the Bible Club to meet on school property as a state endorsement of religion. This is merely speculation. The school district erroneously considers high school age students to be incapable of distinguishing between

activity occurring on school grounds which is sanctioned by the school and activity occurring on school grounds which is not school-sanctioned.

Young adults of high school age are held responsible for their behavior and performance at school, at work, while operating a motor vehicle, and while engaging in other social activities. When young adults fail to conduct themselves in a mature manner, they are made to bear the consequences: they are usually subject to sanctions or punishment whenever they fail to meet behavioral or performance expectations. In short, it defies logic to assume that young adults — who are required to bear adult-like responsibility every day — are incapable of distinguishing between school-sanctioned and nonschool-sanctioned activity occurring on school grounds after school hours.

Westside School District has also either neglected to consider, or has consciously disregarded, the possibility of choosing a less restrictive means of alleviating its concerns. Westside High School could publicize the fact that it does not necessarily endorse or agree with the views expressed by the groups using the limited open forum provided by the school by communicating this to students via school mail, school newspaper, public address announcement, poster, or whatever other method may be appropriate. The school district has chosen not to do this.

In summary, even if the Equal Access Act is ruled by the Court to be unconstitutional or not to apply in this case, Westside School District's denial of the Bible Club's request to use the limited open forum created by the school district is unconstitutional because the state has failed to demonstrate either that there is a compelling justification which mandates such a denial, or that a total ban of the Bible Club is the least restrictive means of furthering a compelling state interest.

CONCLUSION

When considering whether allowing a Bible club to use school property during noninstructional hours violates the Establishment Clause, the Court should recall that it has long recognized the importance of accommodating the religious choices of the nation's citizenry. In *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court pointed out that the First Amendment:

> [R]equires the state to be neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

In another early frequently-cited case, *Zorach v. Clausen,* 343 U.S. 306, 314 (1952), the Court said:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

More recently, Justice Brennan, concurring in the judgment in *McDaniel v. Patti,* 435 U.S. 618, 638 (1978), noted that:

> [T]he limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom

to develop and preach religious ideas and practices is protected by the Free Exercise Clause.

Allowing religious groups an equal opportunity to use a forum made available to other groups confers upon them no unique benefit; rather, it merely permits the state to accommodate those who wish to exercise their religious freedom rights. The Court should affirm the decision of the Eighth Circuit Court of Appeals and rule that the Bible Club is constitutionally entitled to use the limited open forum at Westside High School.

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IN THE

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Petitioners,

v.

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Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The Eighth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amici Curiae*	1
Statement of Facts	3
Summary of Argument	3
Argument	4
I. THE EQUAL ACCESS ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE	4
A. The Equal Access Act has a Secular Legislative Purpose	4
B. The Primary or Principal Effect of the Equal Access Act Neither Advances nor Inhibits Religion	6
C. The Equal Access Act does not Foster an Excessive Entanglement Between Government and Religion	10
II. PETITIONERS' POLICY OF CENSORING PRIVATE RELIGIOUS SPEECH OF STUDENTS VIOLATES THE ESTABLISHMENT CLAUSE	12
III. PETITIONERS' POLICY OF CENSORING PRIVATE RELIGIOUS SPEECH OF STUDENTS VIOLATES THE FREE SPEECH AND FREE EXERCISE CLAUSES	14
A. Petitioners Created a Limited Public Forum for Student Group Meetings Before and After School and thus Cannot Censor Speech Within that Forum Based Upon its Content Unless a Compelling State Interest Clearly Exists	15
B. Petitioners have not Justified their Censorship of Respondents' Speech by Showing that the Policy was Necessary to Serve a Compelling State Interest	20
Conclusion	21

TABLE OF AUTHORITIES

TABLE OF CASES

	Page
Bellotti v. Baird, 443 U.S. 622 (1979)	7
Bender v. Williamsport Area School District, 475 U.S. 534 (1986)	8, 16
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)	10, 16, 17
Board of Airport Commissioners v. Jews For Jesus, Inc., 107 S. Ct. 2568 (1987)	20
Cantwell v. Connecticut, 310 U.S. 296 (1940)	21
Carey v. Brown, 447 U.S. 455 (1980)	9
County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989)	12, 13
Garnett v. Renton School District No. 403, 865 F.2d 1121 (9th Cir.1989)	6, 7, 10
Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988)	16, 17, 18, 19
Lemon v. Kurtzman, 403 U.S. 602 (1971)	3, 4, 12
McDaniel v. Paty, 435 U.S. 618 (1978)	14
Mergens v. Board of Education of Westside Community Schools (Dist. 66), 867 F.2d 1076 (8th Cir. 1989)	*passim*
Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983)	15
Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969)	4, 10, 15, 16, 17
Walz v. Tax Commission, 397 U.S. 664 (1970)	12
Widmar v. Vincent, 454 U.S. 263 (1981)	*passim*
Zorach v. Clauson, 343 U.S. 306 (1952)	12

STATUTES AND LEGISLATIVE HISTORY

	Page
Equal Access Act, 20 U.S.C. §§ 4071-74 (1984) . . .	3, 11
130 Cong. Rec. S 8355 (daily ed. June 27, 1984) . . .	4, 5
S. Rep. No. 357, 98th Cong., 2d Sess. (1984)	5, 8, 13

OTHER AUTHORITIES

D. Elkind, *The Hurried Child* (1981)	7
Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986)	6, 10, 14
Mangrum, *Extracurricular Religious Activities in the Public Schools: Constitutionally Permissible, Required or Proscribed?* 22 Creighton L.Rev. 955 (1989)	19
D. Moshman, *Children, Education, and the First Amendment: A Psycholegal Analysis* (1989)	7, 8, 9, 20, 21
Note, *The Constitutional Dimensions of Student - Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983)	8
J. Nowak, R. Rotunda and J. Young, *Constitutional Law* (3d ed. 1986)	7
N. Postman, *The Disappearance of Childhood* (1982)	7
L. Tribe, *American Constitutional Law* (2d ed. 1988)	13, 16

No. 88-1597

IN THE

Supreme Court of the United States

October Term, 1989

THE BOARD OF EDUCATION of the
WESTSIDE COMMUNITY SCHOOLS (Dist. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The Eighth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AND THE RUTHERFORD INSTITUTES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, TEXAS, VIRGINIA, WEST VIRGINIA AND WISCONSIN, *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE*

This is a First Amendment case. It presents important issues concerning freedom of speech and equal treatment that impact on the liberties of all Americans. The American tradition of nondiscriminatory free and open discourse in public places (with American public schools playing a central role as an important part

*Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

of the "marketplace of ideas") has contributed greatly to the success of our democracy. The Petitioners would drastically restrict this freedom by denying equal access to public school fora to a particular class of citizens — students who express religious beliefs. Petitioners' First Amendment "theory" would permit school authorities to circumscribe and discriminate against public high school students on the basis of the religious content of their speech. Such is not only inconsistent with the American tradition and this Court's First Amendment cases, but it poses a grave threat to freedom of speech as we now know it in this country.

The Rutherford Institute believes that this case, with issues concerning the right of student religious groups to nondiscriminatory access to public school fora on the same basis as other student groups, is of critical importance to our Constitutional jurisprudence and the growth and progress of the Nation. We believe this case presents the Court with an opportunity to clarify the law of equal access and to make clear that religious students do not shed their Constitutional rights at the schoolhouse door.

Amici Curiae, The Rutherford Institute and its affiliated state chapters, have as two of their purposes preserving freedom of speech in the public arena and defending the right of religious persons and organizations to abide by their beliefs free from state intrusion. These values are deeply rooted in America's common law and Constitutional tradition.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrew's University. With state chapters in Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Kentucky, Michigan, Minnesota, Montana, Nebraska, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia and Wisconsin and its national office in Charlottesville, Virginia, The Rutherford Institute undertakes to assist litigants and to participate in significant cases relating to the protection and safeguarding of religious freedom. Counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the

expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts as set forth in Respondents' brief filed with this Court.

SUMMARY OF ARGUMENT

The Equal Access Act does not violate the Establishment Clause of the First Amendment. 20 U.S.C. §§4071-74 (1984). The Act complies with the tripartite test formulated by the Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). First, the Act has the secular legislative purpose of avoiding content-based discrimination against voluntary student groups which wish to meet for free speech purposes on equal terms as other student groups. Second, the primary effect of the Equal Access Act is one of absolute neutrality and, therefore, neither advances nor inhibits religion. Since the Act protects *all* religious, political and philosophical points of view equally against censorship and discrimination, it does not result in an endorsement, or even an apparent endorsement, of any religion or non-religion. Finally, the Act does not require any government entanglement with religion.

Petitioners' policy of excluding and censoring the private religious speech of students violates the Establishment Clause because it clearly conveys a message of state disapproval of religion. Therefore, its primary effect is to inhibit religion in violation of the Establishment Clause.

By their policy and practice of providing facilities for use by student organizations, Petitioners have created a limited public forum for use by student groups. Therefore, in order to justify their content-based exclusion of religious student groups from the school's limited public forum, Petitioners were required to show that their policy is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Since Petitioners failed to make the necessary showing, their policy violates the Free Speech and Free Exercise Clauses of the First Amendment and is

inconsistent with this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).

ARGUMENT

I. THE EQUAL ACCESS ACT DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), this Court formulated a three part test to determine whether a statute or practice which touches upon religion is valid under the Establishment Clause. First, the statute or practice must have a secular purpose; second, its primary or principal effect must neither advance nor inhibit religion; and third, it must not foster an excessive government entanglement with religion. *Id.* at 612-613. In the instant case, the Eighth Circuit correctly concluded that Congress neither violated the Constitution nor misread this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), when it enacted the Equal Access Act to ensure that students in public secondary schools would be protected against discrimination and censorship under the decision in *Widmar*.[1]

A. The Equal Access Act has a Secular Legislative Purpose.

In *Widmar* this Court held that the first prong of the *Lemon* test was "clearly met" by a nondiscriminatory, equal access policy at a public university. 454 U.S. at 271. The Court noted that "an important index of secular effect" is that facilities are open to nonreligious as well as religious speakers. *Id.* at 274. Unlike a policy that permits religious groups, but not others, to use school facilities, an equal access policy serves the secular purpose of

[1] *Mergens v. Board of Education of Westside Community Schools (Dist. 66)*, 867 F.2d 1076, 1079 (8th Cir. 1989). During Senate debate, Senator Levin explained the connection between *Widmar* and the Equal Access Act as follows:

> I am persuaded that the pending amendment is constitutional in light of the Supreme Court's decision in Widmar against Vincent. This amendment merely extends a similar constitutional rule as enunciated by the Court in Widmar to secondary schools.

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin).

ensuring that public fora are open to *all* student organizations and are, therefore, kept free of censorship and content-based discrimination.

The purpose of the Equal Access Act is to ensure that open fora in public secondary schools are truly open and free of discrimination.[2] Congress was particularly concerned that legislation was needed "to protect students who are being discriminated against in secondary schools today based on the religious content of their speech."[3] Clearly, the secular goal of Congress to protect the Constitutional rights of students attending public secondary schools is not violative of the Establishment Clause. In fact, one commentator recently compared the Equal Access Act with statutes banning employment discrimination on the basis of religion and concluded that both serve a valid purpose under the Establishment Clause:

> Consider the statutes banning employment discrimination on the basis of religion. A principal purpose of such statutes is to assist religious minorities. Their purpose also can be characterized as restoring religious neutrality to the private labor market. There is no point to metaphysical debate over the religious or secular nature of such a purpose. Whatever we call it, it is a purpose consistent with the establishment clause. Barring discrimination against religious speech is equally consistent with the establishment clause.

[2] The Senate Judiciary Committee explained the purpose of the Equal Access Act as follows:

> The purpose of this legislation is to clarify and confirm the First Amendment rights of freedom of speech, freedom of association, and free exercise of religion which accrue to public school students who desire voluntarily to exercise those rights during extracurricular periods of the school day when the school permits extracurricular activities.

S. Rep. No. 357, 98th Cong., 2d Sess. 3 (1984).

[3] 130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin). *See also* S. Rep. No. 357, 98th Cong., 2d Sess. 10-11 (1984) (Equal Access Act was designed to rectify a perception of state hostility toward student-initiated religious speech).

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 21-22 (1986).

B. The Primary or Principal Effect of the Equal Access Act Neither Advances nor Inhibits Religion.

"The line between the religious speech protected by the free speech and free exercise clauses and the religious speech forbidden by the establishment clause is the line between private speech and government speech." Laycock, *supra*, at 30. The Equal Access Act does not result in state advancement of religion. Rather, it is strictly neutral legislation that has the primary effect of protecting private speech of all points of view, whether religious, non-religious, or secular, from censorship and content-based discrimination.

This Court considered the identical issue in *Widmar* and concluded that "we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 454 U.S. at 273. The Equal Access Act does not require public secondary schools to sponsor or endorse religious sects or practices. Rather, it merely provides that public officials must refrain from censoring voluntary, student-initiated speech on the basis of its religious, political, philosophical, or other content. Indeed, if allowed equal access to the Westside High School forum, Respondents' Bible Study Club would be one of approximately thirty student clubs meeting at the school. *Mergens*, 867 F.2d at 1077. These other student clubs include a Chess Club, Interact and Zonta, male and female service clubs peripherally connected to Rotary International, and Subsurfers, a club for students and community members interested in scuba diving. *Id.* at 1078. Therefore, "at least in the absence of empirical evidence that religious groups will dominate" the Westside High School open forum, the primary effect of the Equal Access Act is not the advancement of religion. *Widmar*, 454 U.S. at 275.

Recently, in *Garnett v. Renton School District No. 403*, 865 F.2d 1121 (9th Cir. 1989), the Ninth Circuit attempted to distinguish *Widmar* from equal access in public secondary school fora

and concluded that "[t]he religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus." *Id.* at 1125. In reaching this conclusion, the *Garnett* panel placed great weight on the perceived "impressionability" of high school students, compulsory attendance laws "that make students a captive audience," and "the role of public schools in inculcating democratic ideals." *Id.* To the contrary, however, each of these factors point the other way and support the conclusion that the Equal Access Act has a strictly neutral impact on religion.

In the modern age, youth are continuously confronted with a myriad of choices not available to past generations. These choices range from whether to participate in an abortion to whether one should file a lawsuit against his or her parents, teachers or school. These experiences, which infuse the culture, necessarily force maturity upon young people to the extent that some experts now argue that the "dividing line between childhood and adulthood is being unmistakably eroded." N. Postman, *The Disappearance of Childhood* 75 (1982); *see also* D. Elkind, *The Hurried Child* (1981). Indeed, this Court has recognized a pregnant teenager must be allowed to show that she is "mature enough" to make a decision to have an abortion without the necessity of either parental consent or judicial control. *Bellotti v. Baird*, 443 U.S. 622, 643-44, 651 (1979). *See also* J. Nowak, R. Rotunda and J. Young, *Constitutional Law* 705 (3d ed. 1986).

Moreover, both the evidence in this case,[4] as well as respected academic studies, support the conclusion that high school students have the cognitive ability to understand that, in a free and pluralistic society such as ours, toleration of speech or ideas in an open forum does not imply endorsement or sponsorship. *See* D. Moshman, *Children, Education, and the First Amend-*

[4] At trial, David Moshman, Ph.D., an expert in the development of cognitive reasoning and intellectual development of children, testified that by the age of 12 children have the ability to understand the difference between school sponsored or endorsed activities and voluntary student-initiated and directed activities. (Tr. 560: 6-25, 557: 25 - 559:1). Likewise, the Eighth Circuit held that there is no material difference between high school and college students for these purposes. *Mergens*, 867 F.2d at 1080 n.2.

ment: A Psycholegal Analysis 114-19 (1989).[5] Moreover, in connection with its consideration of the Equal Access Act, the Senate Judiciary Committee examined the evidence and specifically concluded "that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism." S. Rep.No. 357, 98th Cong., 2d Sess. 8 (1984). This view is supported by scientific research. For example, one expert recently surveyed the empirical research on deductive reasoning, applied it specifically to the issue of equal access in public secondary schools, and stated the following conclusion:

> These considerations support the Supreme Court's conclusion that most college students will understand the voluntary nature of student groups and will not perceive an establishment of religion. The evidence reviewed . . . suggests that high school students, and probably junior high students as well, cannot be sharply distinguished from college students. There is no reason to think that secondary students will naively assume that all groups meeting in a school are thereby endorsed by the school or that they are encouraged to join all such groups. On the contrary, it seems likely that a prominent sign associated with notices of student activities would be sufficient for adolescents to grasp the voluntary nature of the activities.

Moshman, *supra*, at 117.

Reduced to its essence, the Ninth Circuit's analysis in *Garnett*, amounts to an unsubstantiated fear that students will mistakenly conclude that the government endorses everything it does not censor. This position fails to accord due respect to the Constitutional rights of religious students who seek equal access to open fora in public secondary schools. As former Chief Justice Burger stated in his dissenting opinion in *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 553 (1986) (Burger, C.J., dissenting), if the Free Speech and Free Exercise Clauses "are to retain any vitality, utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform *individual* expression of religious belief into *state* advancement of religion."

[5] *See also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-09 (1983) (collecting research in the field of adolescent psychology suggesting "that high school students are generally independent and capable of critical inquiry").

Even assuming *arguendo* that compliance with the Equal Access Act could give rise to a mistaken perception of endorsement of religion, any regulation or policy adopted by the school to serve its asserted compelling interest under the Establishment Clause must be narrowly drawn to achieve that interest. As this Court held in *Widmar*:

> In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.

454 U.S. at 269-70; *see also Carey v. Brown*, 447 U.S. 455, 461, 464-65 (1980). In the instant case, Petitioners made no effort to narrowly tailor their policy to achieve their interest without burdening Respondents' rights under the Free Speech and Free Exercise Clauses. For example, Petitioners certainly could have eliminated any mistaken perception of endorsement by disclaimer and by explaining the equal access policy to students through announcements and posted notices. Evidence clearly indicates that public high school students would have been able to understand these explanations, and, therefore, there was no need to adopt "the more restrictive alternative of abridging freedom of speech, freedom of association, and the free exercise of religion." Moshman, *supra*, at 118.

Compulsory education laws do not affect these conclusions. Since Respondents' Bible Study Club is both voluntary and student-initiated, there is no possibility of a "captive audience" for Respondents' religious message. To the contrary, compulsory education laws, which require students to attend school, give rise to a special need to protect religious students such as Respondents

from being treated like outsiders whose religious beliefs must be checked at the public schoolhouse door. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 511 (1969).

Finally, the Equal Access Act is perfectly consistent with the role of the public schools in inculcating democratic ideals. Our society's commitment to freedom of religion, freedom of speech, and pluralism is modeled by public schools when they comply with the Equal Access Act.[6] In fact, the schools serve as poor role models for the ideals of freedom and tolerance when they discriminate against and deny equal access to religious student groups. "Whatever the risk that some students will perceive an open forum as an endorsement of all groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows students to talk about anything except religion." Laycock, *supra*, at 20.

C. The Equal Access Act does not Foster an Excessive Entanglement Between Government and Religion.

In *Garnett*, the Ninth Circuit interpreted the entanglement prong of the *Lemon* test in an inflexible manner that threatens the Constitutional rights of religious people to meaningful participation in society. Expressing concern regarding the need for schools to monitor student activities in order to maintain safety and discipline, *Garnett* held: "If the government must engage in continuing supervision of religious activity, church and state become excessively entangled." 865 F.2d at 1126. Taken at face value, this reading of the Establishment Clause would render unconstitutional numerous free speech expressions, including public demonstrations and picketing activities by religious persons if police supervision were provided by the state in order to preserve order and ensure public safety.

[6] *See Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (the fundamental values essential to a democratic society "must, of course, include tolerance of divergent political and religious views").

If a public school requires a monitor to be present at student meetings to preserve order and decorum, it can avoid entanglement simply by instructing the monitor to remain strictly neutral and not participate in the meeting. If the school is concerned that the monitor might, over time, become closely identified with the student group and its religious activities, then it should assign different monitors from time to time; or, for that matter, it could assign monitors who do not identify with and/or are indifferent to the religious beliefs of the group.

Section 4071(c) of the Equal Access Act is clearly designed to ensure that compliance with the Act will not result in excessive entanglement. It provides that a school shall be deemed to offer a fair opportunity to student groups seeking access to the open forum so long as the school uniformly provides that:

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

20 U.S.C. 4071(c). Clearly, compliance with the Equal Access Act presents no risk of excessive entanglement between government and religion. As the Eighth Circuit concluded in the case before this Court, an equal access policy is less likely to entangle the school with religion than is a policy of religious censorship. *Mergens*, 867 F.2d at 1079. While an equal access policy is satisfied when the school adopts a strictly neutral, nondiscriminatory posture as to *all* points of view, a censorship policy requires the school to determine which groups, which words, and which activities are "religious" and therefore forbidden. The policy of religious censorship also results in "a continuing need to monitor group meet-

ings to ensure compliance with the rule." *Widmar*, 454 U.S. at 272 n. 11. Thus, censorship in the public school setting leads to entanglement.[7]

Finally, the entanglement requirement is designed primarily to protect religion against state interference. It was never intended to limit the free speech rights of religious citizens. Therefore, the proper application of the entanglement test is against state interference with religion; it should not be interpreted to require public officials to exclude private religious speakers from public fora.

II. PETITIONERS' POLICY OF CENSORING PRIVATE RELIGIOUS SPEECH OF STUDENTS VIOLATES THE ESTABLISHMENT CLAUSE.

Under the second prong of the *Lemon* test, the Establishment Clause is violated by a public school policy that has the primary or principal effect of inhibiting religion. 403 U.S. at 612. *See also County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086, 3102-03 (1989). Justice O'Connor has stated that the Establishment Clause is violated if a "reasonable observer" would view the challenged policy as conveying a message of governmental disapproval of religion. *See Allegheny*, 109 S. Ct. at 3118, 3121 (O'Connor, J., concurring).[8]

Petitioners' discriminatory policy of excluding Respondents and, thus, censoring the private, religious speech of students violates the Establishment Clause because it sends a message to religious students that they are outsiders and not full members of the high school community; it also sends a message to other student

[7] *See Walz v. Tax Commission*, 397 U.S. 664, 675 (1970), in which this Court noted: "In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."

[8] Justice William O. Douglas expressed the same concern over inhibition of religion in *Zorach v. Clauson*, 343 U.S. 306, 314 (1952):

> That would be preferring those who believe in no religion over those who do believe .... But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

groups that they are preferred and, thus, are insiders and favored members of the high school community. In this respect, as Professor Tribe notes: "A message of *exclusion* . . . is conveyed where the state refuses to let religious groups use facilities that are open to other groups." L. Tribe, *American Constitutional Law* 1175 (2d Ed. 1988) (emphasis in original). This is precisely the evil the eradication of which this Court has found to lie at the core of the Establishment Clause. *Allegheny*, 109 S. Ct. at 3102.

A reasonable observer would conclude that Petitioners' policy denying equal access to Respondents' Bible Study Club conveyed a clear message of disapproval by the government of religion.[9] For example, in the present case before this Court, approximately thirty student groups have been permitted to meet at Westside High School including a Chess club, a scuba diving club, and two service clubs similar to Rotary International. *Mergens*, 867 F.2d at 1077-78. Significantly, until Respondents attempted to form their Bible Study Club in early 1985, "no club had ever been denied access to the school." *Id.* at 1077. As the Senate Judiciary Committee concluded more generally when it heard testimony on the Equal Access Act, "a prohibition on student-initiated, extracurricular, religious speech when other student-initiated extracurricular speech is permitted creates a *reasonable perception* of state hostility toward religious speech." S. Rep. No. 357, 98th Cong., 2d Sess. 10 (1984) (emphasis added).

"Any meaningful formulation of neutrality will dictate that, when the state makes a facility available to *non*religious groups, it must give religious groups no less opportunity." Tribe, *supra*, at 1175-76 (emphasis in original). Therefore, Petitioners' policy of denying equal access to students who plan to engage in religious speech is not a neutral policy. It is a policy of official disapproval of, and discrimination against, private, religious speech and private

[9] Our argument is not based on any assertion that high school students are impressionable and thus would mistakenly perceive the challenged policy as expressing disapproval of religion. Rather, the position of *amici curiae* is that a reasonable observer, whether of high school age, college age, or an adult, would conclude that this discriminatory policy clearly conveys a message of state disapproval of religion.

religious speakers.[10] Thus, its primary effect is to inhibit religion in violation of the Establishment Clause.

III. PETITIONERS' POLICY OF CENSORING PRIVATE RELIGIOUS SPEECH OF STUDENTS VIOLATES THE FREE SPEECH AND FREE EXERCISE CLAUSES.

In *Widmar*, a public university denied a student religious group access to university meeting facilities that were otherwise generally available for use by student organizations. 454 U.S. at 264-65. Finding that the university had created "a forum generally open for use by student groups," *id.* at 267, this Court held that the school's exclusion of religious speech from that forum violated the Free Speech Clause of the First Amendment. *Id.* at 270-77. Significantly, this Court reaffirmed the principle that "religious worship and discussion" are forms of speech entitled to all the protections of the First Amendment. *Id.* at 269. Moreover, the Court also recognized that the Free Exercise Clause is offended by "content-based discrimination against . . . religious speech." *Id.* at 276. "Whether one starts with the principle that the free speech clause requires content-neutral regulation of speech, or with the principle that the religion clauses require strict neutrality toward religion, one arrives immediately at the result in *Widmar*." Laycock, *supra*, at 11.

In the present case, the Eighth Circuit found that "the facts in the case before us today are the same as the facts in *Widmar* except for the setting." *Mergens*, 867 F.2d at 1080. Since the Eighth Circuit concluded that students in public secondary schools were unlikely to confuse an equal access policy with state sponsorship of religion, it held that Petitioners' content-based exclusion of religious speech was unconstitutional under *Widmar*. *Id.* at 1080.

[10] This Court has made it clear that the "Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment).

A. Petitioners Created a Limited Public Forum for Student Group Meetings Before and After School and thus Cannot Censor Speech Within that Forum Based Upon its Content Unless a Compelling State Interest Clearly Exists.

By their policy and practice of providing facilities for use by student groups, Petitioners have created a forum generally open for use by student groups. *See Widmar*, 454 U.S. at 267; *see also Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45-46 (1983). Petitioners have allowed approximately thirty student groups to meet on campus, and, until Respondents attempted to form their Bible Study Club, no student group had ever been denied access to the school's forum. *Mergens*, 867 F.2d at 1077-78. Student groups allowed to meet by Petitioners include a Chess Club, two service clubs similar to Rotary International, and a scuba diving club. *Id.*[11] Thus, the present case before this Court is identical in all material respects to *Widmar* and, as such, Petitioners' content-based exclusion of Respondents' religious speech "violates the fundamental principle that a state regulation of speech should be content-neutral." *Widmar*, 454 U.S. at 277.

As in *Widmar*, the question here is not whether Respondents are entitled to favored treatment concerning the use of school facilities; rather, the issue is whether Petitioners, having opened school facilities for use by student groups, can now discriminatorily exclude Respondents because of the religious content of their speech. *Id.* at 273. In order to justify their content-based exclusion of religious student groups, Petitioners must clearly show that their policy "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 270. *See also Perry*, 460 U.S. at 45-46.

This Court has had occasion to review public high school fora on a number of occasions. For example, in *Tinker* the Court determined implicitly that a public high school campus is a limited public forum for student speech "during the authorized hours." 393 U.S. at 512-13. Under *Tinker*, a prior restraint on student speech is permissible only upon a "showing that the students'

[11] Other groups permitted to meet on campus include Future Business Leaders of America and the Photography Club. *See* Pretrial Order Stipulation #17.

activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

As previously discussed, the reasoning in *Widmar* applies with full and equal force to public high school fora. This Court recently reaffirmed that, under *Widmar*, public school facilities "may be deemed to be public forums" if school authorities have by policy or by practice opened those facilities for use "by some segment of the public, such as student organizations." *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562, 568 (1988). Thus, read together, *Tinker*, *Widmar* and *Hazelwood* stand for the principle that a content-based exclusion from a limited public forum for high school student groups violates the Free Speech Clause unless the policy is necessary to serve a compelling state interest and is narrowly drawn to achieve that purpose.[12]

Neither *Hazelwood* nor *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), is to the contrary. The critical distinction between the present case and those cases is between voluntary student-initiated speech in a limited public forum and school-sponsored speech in a restricted forum.

In *Fraser*, a student was suspended after delivering a speech nominating another for student elective office. The speech was delivered before a "captive audience" of students attending an assembly, which this Court found to be "part of a school-sponsored educational program in self-government." *Id.* at 677, 684. During the entire speech, the student referred to his candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-78. The result was to create a substantial disruption of the school-sponsored student assembly. Some students hooted, yelled, and graphically simulated the sexual activities alluded to in the speech; other students were "bewildered and embarrassed by the speech." *Id.* at 678. Thus, the speech in *Fraser* resulted in a

[12] In *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986), the four Justices of this Court who reached the merits of the case would have applied *Widmar* to a public secondary school. *Id.* at 552-53 (Burger, C.J., joined by White and Rehnquist, J.J., dissenting). *Id.* at 555-56 (Powell, J., dissenting); *see also* L. Tribe, *supra*, at 1177. In fact, Justice Powell in his dissent in *Bender* remarked: "I do not believe — particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar*." 475 U.S. at 556.

material and substantial disruption of the work and discipline of the school, and this Court accordingly held that the school district "acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech." *Id.* at 685.

The facts here are totally different from those in *Fraser*. Respondents wish to form a voluntary, student-initiated Bible Study Club for the purpose of engaging in private religious speech in a forum that is generally open to student organizations. There is no captive audience for Respondents' speech, the meetings will not be part of a school-sponsored assembly, and, significantly, their speech will not be lewd, sexually explicit, or disruptive of the work and discipline of the school. Therefore, Respondents' speech is protected under *Tinker* and *Widmar* and not subject to exclusion under *Fraser*.

In *Hazelwood* this Court again reviewed student speech on the high school campus. As such, this Court in *Hazelwood* reaffirmed the continuing validity of *Tinker* as applied to speech in which students express "their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours.'" 108 S.Ct. at 567 (quoting *Tinker*, 393 U.S. at 512-13). As previously discussed, *Hazelwood* also confirmed that public school officials can create, "by policy or by practice," limited public fora for use by student organizations. 108 S.Ct. at 568 (citing *Widmar* and *Perry*). Thus, *Hazelwood* does not depart from the established principles of *Tinker*, *Widmar* and *Perry* in the context of student-initiated speech in a public high school open forum.

Hazelwood concerns student speech in the context of a closed forum—a school-sponsored newspaper named "*Spectrum*." Pursuant to a written school board policy, *Spectrum* was published by the Journalism II class and therefore was "within the adopted curriculum" of the school. *Id.* Journalism II was taught by a faculty member during regular class hours and students received grades and academic credit for their participation in the course. *Id.* Not only was the newspaper designated an official part of the curriculum and a regular classroom activity, but it was the practice of

the Journalism II teacher, Mr. Stergos, to "exercise a great deal of control" over the publication. *Id.*[13] Thus, this Court held that the school-sponsored newspaper was not a limited public forum for its student reporters and editors, or for the student body generally. *Id.* at 569.

The restricted forum found by the Court in *Hazelwood* is based upon the specific written policies and established practices of the school and its officials in exercising great discretion and control over a school-sponsored newspaper. Thus, the question in *Hazelwood* was different from the question in *Tinker* and *Widmar*. The *Hazelwood* Court clearly recognized this distinction:

> The question whether the First Amendment requires a school ~~to tolerate~~ particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. "Thus while *Tinker* requires secondary schools to accommodate the free speech rights of students, *Hazelwood* distinguishes personal from school-endorsed speech. If the students invoke the

[13] As the Court noted:

> [Mr. Stergos] selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company.

108 S. Ct. at 568. In addition, Stergos was "the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content." *Id.* Moreover, after final review and editing by Stergos, each issue of *Spectrum* had to be reviewed and approved prior to publication by the principal of the school. *Id.*

school's endorsement, then the school may exercise reasonable regulatory constraints." Mangrum, *Extracurricular Religious Activities in the Public Schools: Constitutionally Permissible, Required or Proscribed?* 22 Creighton L.Rev. 955, 963 (1989).

Hazelwood establishes a three part test that must be satisfied by school officials who wish to exercise control over student expression in a restricted forum:

1. The school must have adopted and have in place a specific written policy defining, describing, and limiting the restricted forum in question;
2. The restricted forum must be part of the school curriculum, students must be supervised by faculty members, and the activity must be "designed to impart particular knowledge or skills to student participants and audiences"; and
3. As a matter of policy and practice, the school must exercise strict control over the forum, even to the extent of "story ideas" and the forum's "content."

108 S. Ct. at 568, 570. Petitioners have failed to satisfy the requirements of *Hazelwood*. Instead, they seek to exclude the private, personal speech of Respondents from an otherwise generally open forum for student organizations. This attempt to silence the personal expression of students taking part in voluntary, student-initiated organizations is inconsistent with the holdings in *Tinker* and *Widmar*.

At trial, Petitioners argued that each of the approximately thirty student clubs allowed to meet on campus is curriculum-related. For example, Dr. Findley, the principal of Westside High School, testified that the Chess Club related to the curriculum because "it fosters critical thinking and logic." *Mergens*, 867 F.2d at 1078. He also testified that Zonta and Interact, the service clubs related to Rotary International, "are related to the goals of sociology and psychology" and that the scuba diving club "relates to the goals of physical education." *Id.* at 1078. This feeble attempt to argue that the school maintains a closed forum is without merit. It is inconsistent with all of this Court's school forum cases, and, if

adopted, would make the Constitutional rights of public secondary school students completely dependent upon administrative decree. The Eighth Circuit refused to allow the school to "simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group." *Id.* at 1078. This attempt by Petitioners to circumvent the First Amendment by administrative decree, similar to the policy of the Board of Airport Commissioners struck down by this Court in *Board of Airport Commissioners v. Jews For Jesus, Inc.*, 107 S. Ct. 2568 (1987), is "substantially overbroad, and . . . not fairly subject to a limiting construction." *Id.* at 2573.[14]

B. Petitioners have not Justified their Censorship of Respondents' Speech by Showing that the Policy was Necessary to Serve a Compelling State Interest.

As previously discussed, in order to justify their content-based exclusion of religious student groups from the limited public forum Petitioners are required to demonstrate that their policy "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar*, 454 U.S. at 270. Any attempt by Petitioners to assert a compelling state interest based upon the Establishment Clause is completely without merit.[15] *See Widmar*, 454 U.S. at 270-275. As discussed, *supra*, the Establishment Clause does not require public secondary schools to exclude the private religious speech of students from campus. Respondents' religious speech is neither school-sponsored, nor is it likely to be perceived as being school-endorsed. *See* Moshman, *supra*, at 117. It is purely personal speech and, therefore, is protected under the Free Speech and Free Exercise Clauses and is not prohibited by the Establishment Clause.

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[14] In *Jews for Jesus*, this Court noted: "In essence, the result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related." 107 S. Ct. at 2573. The very same issue is implicated in the present case.

[15] The previous discussion of the Establishment Clause and its relation to the Equal Access Act applies equally to the issue being discussed in the text. *See supra* Arguments I and II.

Even assuming *arguendo* that Petitioners have a compelling interest in avoiding a mistaken perception of endorsement of religion, they have not narrowly tailored their policy to achieve that interest without unnecessarily burdening Respondents' rights under the Free Speech and Free Exercise Clauses. For example, Petitioners certainly could have eliminated any mistaken perception of endorsement by disclaimer and by explaining our society's commitment to free speech and religious tolerance to students through announcements and posted notices. Again, as the evidence illustrates, public high school students would have been able to understand these explanations, and, therefore, there was no need to adopt "the more restrictive alternative of abridging freedom of speech, freedom of association, and the free exercise of religion." Moshman, *supra*, at 118.

CONCLUSION

Perhaps one person's speech is another person's blasphemy. Nevertheless, in one of the Supreme Court's landmark religious speech cases, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), this Court stated:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. [Bitter controversies may occur but] the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to the enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310. In short, "a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Id.* at 308.

It is crystal clear that Petitioners' exclusion of Respondents from the Westside High School public forum is inconsistent with our nation's commitment to free speech and religious freedom. Under both the Equal Access Act and the Constitution, religious student groups are protected against such content-based exclusion

from public secondary school fora open to other student organizations. The Equal Access Act is perfectly consistent with the Establishment Clause and this Court's prior decisions. Moreover, Petitioners' policy of censoring the private religious speech of students violates the Establishment, Free Speech, and Free Exercise Clauses. This discriminatory policy also is inconsistent with this Court's decisions in *Tinker* and *Widmar*.

For all the compelling reasons set forth above, the judgment of the Court of Appeals must be upheld.

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IN THE
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THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. SCHOOL ADMINISTRATORS CONTRAVENE THE EQUAL ACCESS ACT WHEN THEY DISCRIMINATE AGAINST VOLUNTARY STUDENT GROUPS BECAUSE OF THE RELIGIOUS NATURE OF THEIR ACTIVITY	5
A. A Form of Remedial Civil Rights Legislation, the Equal Access Act Protects Secondary School Students Desiring to Meet Voluntarily for Religious Purposes from Discriminatory and Unfair Treatment	8
B. Westside High School Violated the Equal Access Act by Prohibiting a Student Bible Study Club to Meet Voluntarily During Nonstructional Time	10
1. In This Remedial Legislation, Congress Intended and Properly Provided Broader Protections Than Those Required Under the First Amendment	11
2. Under the Equal Access Act a Limited Public Forum Is Created When a Public Secondary School in Practice Allows Student Groups to Meet for Purposes Not Directly Related to the School Curriculum	13
3. A Limited Public Forum Within the Meaning of the Act Existed at Westside High School	16

TABLE OF CONTENTS—Continued

	Page
II. ALLOWING A VOLUNTARY STUDENT BIBLE STUDY GROUP TO MEET DURING NONINSTRUCTIONAL TIME DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. THE ACT EFFECTS AN ACCOMMODATION OF LEGITIMATE FREE EXERCISE CONCERNS IN A WAY THAT PROTECTS RELIGIOUS LIBERTY THROUGH VOLUNTARY ACTIVITY	19
A. Allowing Students to Meet Under the Act Does Not Violate the Establishment Clouse	19
B. Accommodation of Voluntary Student Religious Groups Protects Religious Liberty Guaranteed by the First Amendment. The Establishment Clause May Not and Should Not Be Used As a Tool to Inhibit the Free Exercise of Religion	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	Page
Abington Township v. Schempp, 374 U.S. 203 (1963)	6
Aguilar v. Felton, 473 U.S. 402 (1985)	2, 5
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	22
Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986)	20
Board of Education v. Allen, 392 U.S. 236 (1968)	6
City of Rome v. United States, 446 U.S. 156 (1980)	11
Committee for Public Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)	19
Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987)	11
County of Allegheny v. American Civil Liberties Union, 109 S. Ct. 3086 (1989)	21, 22
Edwards v. Aguillard, 482 U.S. 578 (1987)	5, 21
Everson v. Board of Education, 330 U.S. 1 (1947)	2
Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985)	24
Guardians Ass'n v. Civ. Serv. Comm'n of New York, 463 U.S. 582 (1983)	11
Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988)	8, 16, 18, 20
Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136 (1987)	23
Katzenbach v. Morgan, 384 U.S. 641 (1966)	11
Lau v. Nichols, 414 U.S. 563 (1974)	9
Lemon v. Kurtzman, 403 U.S. 602 (1971)	20
Lynch v. Donnelly, 465 U.S. 668 (1984)	2, 19, 24
McDaniel v. Paty, 435 U S. 618 (1978)	5, 26
Meek v. Pittenger, 421 U.S. 349 (1975)	23, 24
Mergens v. Board of Educ. of Westside Community School, 867 F.2d 1076, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597)	*passim*
Mergens v. Board of Educ. of Westside Community Schools, No. CV-85-0-426 (D. Neb. Feb. 2, 1988), printed in Pet. App. B	13, 16, 17, 22

TABLE OF AUTHORITIES—Continued

	Page
North Haven Board of Educ. v. Bell, 456 U.S. 512 (1982)	10
School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)	5
Student Coalition v. Lower Merion School Dist. 633 F. Supp. 1040 (E.D. La. Pa. 1986)	12
Thomas v. Review Board, 450 U.S. 707 (1981)	24
Tcherepnin v. Knight, 389 U.S. 332 (1967)	10, 14
United States v. Wiley, 78 U.S. 508 (1871)	10
Wallace v. Jaffree, 472 U.S. 38 (1985)	20, 24
Walz v. Tax Comm'n, 397 U.S. 664 (1970)	11
Wheeler v. Barrera, 417 U.S. 402 (1974)	10
Widmar v. Vincent, 454 U.S. 263 (1981)	4, 11, 12, 20, 21, 22
Wisconsin v. Yoder, 406 U.S. 205 (1972)	5, 23
Zorach v. Clauson, 343 U.S. 306 (1952)	2, 3, 23, 25, 26

CONSTITUTIONAL PROVISIONS

United States Constitution, article I, section 8	11
United States Constitution, first amendment	*passim*
United States Constitution, fourteenth amendment, section 5	11

STATUTES AND REGULATIONS

20 U.S.C. §§ 1681-1688 (1982)	9
20 U.S.C. §§ 2701-2792 (1982 & Supp. V 1987)	10
20 U.S.C. §§ 4071-74 (Supp. V 1987)	*passim*
29 U.S.C. § 794 (1982 & Supp. V 1987)	9
42 U.S.C. §§ 2000d-2000d-7 (1982 & Supp. V 1987)	9
34 C.F.R. § 104.22 (1988)	9
34 C.F.R. § 104.23 (1988)	9
34 C.F.R. § 104.33 (1988)	9
34 C.F.R. § 104.34 (1988)	9
34 C.F.R. § 104.35 (1988)	9
34 C.F.R. § 104.37 (1988)	9
34 C.F.R. § 106.36(b) (1988)	9
34 C.F.R. § 106.41 (1988)	9

TABLE OF AUTHORITIES—Continued

CONGRESSIONAL MATERIALS

	Page
H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984)	3, 7, 14, 18
S. Rep. 98-357, 98th Cong., 2d Sess. (1984)	3, 6, 7, 12, 22, 25
130 *Cong. Rec.* H7723-41 (daily ed. July 25, 1984)	7
130 *Cong. Rec.* S8335-70 (daily ed. June 27, 1984)	7
130 *Cong. Rec.* H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling)	15
130 *Cong. Rec.* S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy)	14
130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield)	15
130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton)	15
Hearings Before the Subcommittee on Elementary Secondary, and Vocational Education of the Committee on Education and Labor, House of Representatives, on H.R. 4996, 98th Cong., 2d Sess. (1984)	26

MISCELLANEOUS

American Council on Education, *The Function of the Public Schools in Dealing With Religion*, 6 (1953)	3, 25
Buzzard and Ericsson, *The Battle for Religious Liberty* (1982)	6
Gallup, "Religion in America: 50 Years, 1935-1985" (Rep. No. 236, May, 1985)	5
J. Jacobs, *Individual Rights and Institutional Authority* (1979)	8
Laycock, *Equal Access and Moments Of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U.L. Rev. 1 (1986)	12
McConnell, "Accommodation of Religion" in *The Supreme Court Review 1984* (1986)	6
R. J. Neuhaus, *The Naked Public Square* (1984)	6

TABLE OF AUTHORITIES—Continued

Page

Strossen, *Constitutional Analysis Of the Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 Harv. J. on Legis. 119 (1987) 12, 14, 16

L. Tribe, *American Constitutional Law* (2d ed. 1988) 26

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THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners,

v.

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Respondents.

On Writ of Certiorari to United States Court of Appeals for the Eighth Circuit

BRIEF OF THE UNITED STATES CATHOLIC CONFERENCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS*

The United States Catholic Conference ("Conference") is a nonprofit corporation organized under the laws of the District of Columbia. Its members are the active Catholic Bishops in the United States. The Conference advocates and promotes the pastoral teaching of the Bishops in such diverse areas as education, family life, health and hospitals, social welfare, immigrant aid, poverty assistance, civic education, youth activities, and communications. When permitted by court rules and practice, the Conference files briefs as *amicus curiae* in litigation of importance to the Catholic Church and its people in the United States, particularly when the Religion Clauses of the Constitution are implicated.

The Equal Access Act protects public secondary school students who desire to exercise important First Amendment rights from discriminatory treatment at the hands of public school authorities. 20 U.S.C. §§ 4071-74 (Supp. V 1987). Because it shares this important goal, the Conference actively supported the Act during Congressional consideration. The United States Court of Appeals for the Eighth Circuit correctly decided that the Westside Community Schools had discriminated against the student Bible study club on the basis of the religious content of its activities. This Court should confirm the Congressional decision to prevent discrimination against voluntary student religious groups and thereby to protect the First Amendment rights of public school students.

Through their counsel, the parties have given consent to the filing of this brief.

SUMMARY OF ARGUMENT

The Religion Clauses of the First Amendment, properly construed in accord with their historic purposes, do not require a rigid, absolute, separation of church and state but rather affirmatively mandate accommodation of religion. *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). *Everson v. Board of Education*, 330 U.S. 1 (1947), signaled the beginning of concerted efforts to effect a total elimination of religion from public schools. Separationist efforts at times smack of hostility and insensitivity, as well as reflect dubious constitutional doctrine. Nevertheless, the efforts to impose an absolutist separation doctrine persisted, a trend reflected in this Court's own uneven decisions. *Compare Zorach v. Clauson*, 343 U.S. 306 (1952), *with Aguilar v. Felton*, 473 U.S. 402 (1985).

This trend was felt not only in litigation, but, more significantly, also in the nation's public schools where discussion of religion and religious values was virtually eliminated. The tragic victims were the students, as explained by the American Council on Education:

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.

American Council on Education, *The Function of the Public Schools in Dealing With Religion*, 6 (1953).[1] *See* S. Rep. No. 98-357, 98th Cong., 2d Sess. 14-21 (1984). During Congressional hearings on the scope of the problem, students from every part of the country testified about being prohibited by school officials from engaging in voluntary student-initiated religious discussion or activity.[2] "Witness after witness testified about the existence of that tragic perception [of state hostility toward religious speech] among students and citizens." S. Rep. No. 98-357, 98th Cong., 2d Sess. 10 (1984).

Congress enacted the Equal Access Act ("Act") in response to the established pattern of discrimination against religious speech and student religious groups. The Act is intended to ensure fair treatment for students and to protect their First Amendment rights of free speech, free association and free exercise of religion. The Act simply requires public secondary schools that receive federal assistance to accommodate voluntary student religious groups by allowing them to meet outside of regular school hours on the same basis as other noncurriculum related student groups. 20 U.S.C. § 4071 (Supp. V 1987). As remedial legislation it is no different from numerous other civil rights statutes that limit the discretion of school districts which opt to participate in

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[1] The American Council on Education is an independent nonprofit association which represents all accredited public and private post-secondary institutions, as well as national and regional higher education associations.

[2] *See generally* S. Rep. 98-357, 98th Cong., 2d Sess. (1984); H.R. Rep. 98-710, 98th Cong., 2d Sess. (1984).

federal programs and receive federal financial assistance. In its considered judgment, Congress acted to protect the First Amendment rights of students from discrimination by public school officials. In doing so, Congress provided broader protection than that required by the Free Exercise and Free Speech Clauses, a legitimate and proper exercise of Congressional authority.

In the present case, Westside High School has a policy and practice of allowing student groups to meet after school hours, without regard to whether the groups are narrowly tied to the school curriculum. The School features a chess club, a scuba club, community action groups and others. Nonetheless, it refused to allow students to form a voluntary Bible study club and meet on school premises after instructional hours. The United States Court of Appeals for the Eighth Circuit correctly understood that Westside's actions were patent discrimination against the students in violation of the Act. *Mergens* v. *Board of Educ. of Westside Community Schools*, 867 F.2d 1076, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597). In doing so, the Eighth Circuit rejected an open-ended argument which would allow school authorities to define away the discrimination by artificial distinctions, and thereby rendering the Act meaningless.

Petitioners assert an Establishment Clause argument in an attempt to justify their discriminatory treatment of the students in this case. Allowing the student Bible study group here to meet voluntarily after regular school hours does not violate the Establishment Clause. This Court made clear in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), that excluding voluntary student religious activity while permitting nonreligious groups to meet on school premises is unconstitutional. Allowing such meetings does not, at the same time, violate the Establishment Clause. That same logic applies here and *Widmar* controls.

The Eighth Circuit's decision allowing a voluntary student club under the Act reflects another even more important principle. It fully comports with the principle of religious accommodation rooted in the history and purposes of the Religion Clauses. Simply accommodating the needs of voluntary student religious groups can hardly be characterized as a violation of the Establishment Clause, which serves to buttress "the right to free exercise of religious beliefs." *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972). The Establishment Clause cannot be allowed to be used as "a sword to justify repression of religion." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Yet this is precisely the result urged by Petitioners. This Court must reject strained applications of the Establishment Clause, such as suggested in this case, that undermine the accommodation principle embodied in the Religion Clauses.

ARGUMENT

I. SCHOOL ADMINISTRATORS CONTRAVENE THE EQUAL ACCESS ACT WHEN THEY DISCRIMINATE AGAINST VOLUNTARY STUDENT GROUPS BECAUSE OF THE RELIGIOUS NATURE OF THEIR ACTIVITY.

Religion, not just as it concerns one's own life but as it bears on public life, is vital to most Americans. As a people, we are among the most religious in the world. Gallup, "Religion in America: 50 Years, 1935-1985" (Rep. No. 236, May 1985). As a "religious people," we struggle in the 1980's, as we did in the 1950's and as we will in the 1990's, with the proper relationship between religion and our public institutions, especially it seems, our public schools. *Zorach v. Clauson*, 343 U.S. 306 (1951); *Edwards v. Aguillard*, 482 U.S. 578 (1987). In recent years, and in part perhaps because this Court's treatment of religion in *Aguilar v. Felton*, 473 U.S. 402 (1985), and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), so radically departed from our history

and tradition,[3] the free exercise of religion has been systematically attacked whenever it appeared in public schools.[4] These battles are being initiated by those marching under a banner proclaiming a preference for a secular society as well as a secular state, and they threaten the shared social values necessary to a truly pluralistic democracy. R. J. Neuhaus, *The Naked Square* (1984). Even though there have been renewed calls for an accommodation between religion and our public institutions,[5] some are still hostile to the legitimate exercise of private religious choices in schools, while others are intimidated by the threat of vexatious litigation into denying students their right to religious expression.

During hearings on the Act, the Senate Judiciary Committee heard testimony that many school districts have banned student-initiated extracurricular religious clubs, student newspaper articles on religious topics, and student art with religious themes.[6] School districts "have even prohibited students from praying together in a school parking lot, sitting together in groups of two or more to discuss religious themes, and carrying personal Bibles on school property." [7] Numerous examples of religious discrimination were cited in both committee re-

[3] Churches provided the vast bulk of education through the first quarter of the Nineteenth Century. *Abington Township v. Schempp*, 374 U.S. 203, 238 n.7 (Brennan, J., concurring). As public schools began to share the educational burden with church schools, there remained, and still remain, many state involvements with church-related education without any violation of the First Amendment. *Board of Education v. Allen*, 392 U.S. 236, 245-46 (1968).

[4] Buzzard and Ericsson, *The Battle for Religious Liberty*, 9-12 (1982).

[5] McConnell, "Accommodation of Religion" in *The Supreme Court Review 1985* (1986).

[6] S. Rep. No. 98-357, 98th Cong., 2d Sess. 11-12 (1984).

[7] *Id.*

ports as well as during the floor debates[8] in the House and Senate on the final version of the Act. This established pattern of discrimination against religious speech prompted Congress to legislate equal access as a statutory remedy to protect student rights.

In citing the need for national legislation, the Senate Judiciary Committee concluded that "many school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech." [9] Under the Act it is unlawful for any public secondary school which receives federal financial assistance and which has a limited open forum to deny equal access to, or discriminate against, any students who wish to conduct a meeting on the basis of the religious or other content of speech at such meeting. 20 U.S.C. § 4071(a). A limited public forum exists whenever a school grants an opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time. 20 U.S.C. § 4071(b). The House Committee on Education and Labor summarized that the purposes of the Act "are to eliminate discrimination against student religious groups that occurs when such groups are denied access to school facilities and to establish a policy of fair, even-handed treatment." [10]

[8] 130 *Cong. Rec.* H7723-41 (daily ed. July 25, 1984); 130 *Cong. Rec.* S8335-70 (daily ed. June 27, 1984). Although the final language of the Act was revised after committee action, the committee reports accurately reflect the purposes of the Act and the extent and nature of the problem Congress sought to address.

[9] S. Rep. No. 98-357, 98th Cong., 2d Sess. 11 (1984).

[10] H. R. Rep. No. 98-710, 98th Cong., 2d Sess. 1 (1984).

A. A Form of Remedial Civil Rights Legislation, the Equal Access Act Protects Secondary School Students Desiring to Meet Voluntarily for Religious Purposes from Discriminatory and Unfair Treatment.

Subject to constitutional restraints, the judiciary generally accords school authorities broad discretion in education matters. J. Jacobs, *Individual Rights and Institutional Authority*, xxiv-v (1979). In matters affecting the educational content of the curriculum and gauging and responding to potential disruptions in the environment conducive to education, school officials have virtually unlimited discretion. *See Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988). That discretion, however, may be restrained by actions of higher authorities and by the law. Where the Congress or a state legislature properly acts on a matter within the schools, administrators are appropriately guided in the exercise of otherwise unfettered discretion.

A familiar issue for legislative action is the protection of civil rights. By placing conditions on the receipt of federal financial aid, Congress often seeks to eliminate discrimination and to protect the civil rights of individuals. *See, infra*, notes 11-20. These numerous federal statutes limit educators' discretion in matters such as the content of materials, the provision of special educational programs, and student placement. In the absence of such a statute and a choice by school administrators to participate in federal programs, administrative discretion generally would control. Having chosen otherwise, public schools cannot complain about legislation designed to correct established patterns of discrimination, or about the Congress' constitutional authority so to legislate.

Under Title VI of the Civil Rights Act of 1964,[11] a school district may be required to provide special language courses in its curriculum in order to eliminate discrimination against foreign language speaking students. *Lau v. Nichols*, 414 U.S. 563, 568 (1974). Similarly, Title IX of the Education Amendments of 1972 [12] requires school districts to scrutinize the content of tests and other materials used in counselling and to eliminate sex bias,[13] as well as provide new programs, particularly in the area of athletics,[14] and physical plant modifications.[15] Section 504 of the Rehabilitation Act of 1973 [16] requires school districts that receive federal financial assistance to provide a free appropriate public education for handicapped students.[17] School districts are required to develop individualized educational programs for each handicapped child.[18] In addressing the needs of educationally deprived children, school districts that participate in Title I of the Elementary and Secondary Educa-

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[11] 42 U.S.C. §§ 2000d-2000d-7 (1982 & Supp. V 1987). Title VI prohibits discrimination on the basis of race, color, and national origin in programs that receive federal financial assistance.

[12] 20 U.S.C. §§ 1681-1688 (1982). Title IX prohibits discrimination on the basis of sex in education programs.

[13] 34 C.F.R. § 106.36(b) (1988).

[14] *Id.* § 106.41.

[15] *Id.*

[16] 29 U.S.C. 794 (1982 & Supp. V 1987). Section 504 prohibits discrimination on the basis of handicap.

[17] 34 C.F.R. § 104.33 (1988).

[18] *Id.* § 104.35. Where necessary, physical modifications to buildings may be required to make them accessible. *Id.* §§ 104.22, 104.23. To the maximum extent possible, school districts must place handicapped students in regular classes with other students, *id.* § 104.34, and, if necessary, must provide nonacademic services, such as counseling and health services. *Id.* § 104.37.

tion Act of 1965 [19] must provide special remedial educational services to students, including educationally deprived students attending private schools.[20]

Like the above laws, the Act at issue here was designed by Congress to eliminate discrimination against voluntary student religious groups. Manifestly, the Act is remedial in nature.[21] Like other civil rights laws, it only requires compliance when public secondary schools receive federal financial assistance. If they do, they must allow student religious groups to meet voluntarily just like other voluntary student groups. This minimal requirement pales in comparison to the numerous other substantive limitations placed on school districts when they seek and receive federal financial assistance. School districts are not required to accept federal financial assistance and, if a secondary school deems the Act's minimal requirements too onerous, it is free to decline the assistance. *See Wheeler v. Barrera*, 417 U.S. 402, 425 (1974). Having made the choice, school administrators may not discriminate against, as is pertinent here, voluntary student religious activity.

B. Westside High School Violated the Equal Access Act by Prohibiting a Student Bible Study Club to Meet Voluntarily During Noninstructional Time.

In construing a statute, the starting point is the statutory language itself. *North Haven Board of Educ. v. Bell*, 456 U.S. 512, 520 (1982). In this case the Act only

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[19] 20 U.S.C. §§ 2701-2792 (1982 & Supp. V 1987).

[20] *Id.* § 2727. In the case of private school children, participating school districts must design and deliver remedial services that in many instances they would not normally provide.

[21] It is well settled that remedial statutes should be construed liberally to effectuate their purposes, *Tcherepnin v. Knight*, 389 U.S 332, 336 (1967), and in favor of those whose rights are being vindicated, *United States v. Wiley*, 78 U.S. 508, 515 (1871). Thus, it is appropriate to construe the Act liberally in favor of the students here in order to protect their First Amendment rights.

applies when a public secondary school "receives Federal financial assistance" and has "a limited open forum." 20 U.S.C. § 4071(a). Here there is no dispute about either the receipt of federal financial assistance or the denial of access to the school facilities on the basis of the religious content of student activities. The only issue for the purpose of deciding whether the statute was violated is whether Westside High School has a limited public forum for the purposes of the Act.

1. *In This Remedial Legislation, Congress Intended and Properly Provided Broader Protections Than Those Required Under the First Amendment.*

In protecting the civil rights of individuals, Congress can impose stricter standards on states than that required by the constitutional provision pursuant to which the statute was enacted. *City of Rome v. United States*, 446 U.S. 156 (1980). This is true whether Congress is acting pursuant to the Spending Clause, *Guardians Ass'n v. Civ. Serv. Comm'n of City of New York*, 463 U.S. 582 (1983), or section 5 of the Fourteenth Amendment, *Katzenbach v. Morgan*, 384 U.S. 641 (1966), both of which could apply to the Act here. In the area of religious liberty, it is well established that the limits of permissible state accommodation are by no means coextensive with the noninterference mandated by the Free Exercise Clause. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 334 (1987); *Walz v. Tax Comm'n*, 397 U.S. 664, 673 (1970). Congress can legislate more broadly to protect civil and religious liberties, a point evident in the Act.

Congress utilized this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), as support for the Act. In *Widmar* this Court held that a public university violated the free speech rights of a student religious group by refusing to allow it to use facilities that were generally available for use by other student groups. Assuming

arguendo that *Widmar* set the initial standards for resolving equal access disputes,[22] the Act, in pertinent part, extends beyond *Widmar*. Stated simply, in *Widmar* the university recognized over 100 student groups; a failure to recognize one more group was held unfair. Under the Act the equal access requirement applies when a public secondary school allows even "one or more noncurriculum student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b).[23] At least one lower court has held that the Act contains a different and broader concept of limited public forum than required by *Widmar*. *Student Coalition v. Lower Merion School Dist.*, 633 F. Supp. 1040, 1043 (E.D. Pa. 1986). This conclusion is shared by commentators.[24] "The statutory 'limited open forum' is an artificial construct, and comparisons with the constitutional cases can be misleading." [25] The statutory definition is rigorous in preventing discrimination.

[22] In Argument II, we note that under *Widmar* the Act is constitutional.

[23] Congress incorporated a definition that *on its face* sweeps more broadly than *Widmar* and offers protection for student rights beyond those necessarily decided in that case. The statutory definition of limited open forum differs in several respects from the "forum" found in *Widmar*. Besides the distinction noted in the text, curriculum relatedness is a critical limiting factor in the statute, an issue on which *Widmar* did not focus. 20 U.S.C. § 4071(b), 4072(3). Finally, the Court in *Widmar* did not resolve the free exercise issue, 454 U.S. at 273 n. 13, while the Act here has the protection of free exercise rights as one of its primary purposes. S. Rep. No. 98-357, 98th Cong., 2d Sess. 3 (1984).

[24] *See* Strossen, *Constitutional Analysis Of The Equal Access Act's Standards Governing Public School Student Religious Meetings*, 24 Harv. J. on Legis. 119, 162 (1987); Laycock, *Equal Access And Moments Of Silence: The Equal Status of Religious Speech By Private Speakers*, 81 Nw. U.L. Rev. 1, 36 (1986).

[25] Laycock, *supra* note 24, at 36.

2. *Under the Equal Access Act a Limited Public Forum Is Created When a Public Secondary School in Practice Allows Student Groups to Meet for Purposes Not Directly Related to the School Curriculum.*

The triggering mechanism for application of the Act is the existence of a limited public forum as defined in section 4071(b) of the Act. Under that section a limited public forum exists whenever a public secondary school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time. Even one such activity would mandate "equal access" for religious clubs. If there are no such groups, that is, if all clubs are tied to the curriculum, no forum is created that would encompass religious clubs under the Act. The school district here, therefore, attempts to define away its problem by expanding its notion of curriculum relatedness.

In Petitioners' view, a student group would be considered curriculum related (and not trigger the Act) if it touched in any remote way on any subjects discussed during regular instruction or if it related in any way to some vaguely defined general educational goal, such as "developing citizenship, wholesome attitudes, good human relations, knowledge and skills" that is found in School Board Policy 5680. *Mergens v. Board of Educ. of Westside Community Schools*, No. CV 85-0-426 (D. Neb. Feb. 2, 1988), *printed in* Pet. App. B 19. Under this approach school officials would effectively have unfettered discretion to decide what is or is not curriculum related for the purposes of the Act. Not only is this at odds with the construction of civil rights laws generally, but, as the Eighth Circuit held, "[a]llowing such a broad interpretation of 'curriculum-related' would make the [Act] meaningless." *Mergens*, 867 F. 2d at 1078.

It is clear that Congress was concerned that school officials not be allowed to "circumvent the intent and application of [the] Act by officially sponsoring all similar but nonreligious student-initiated groups." [26] Senator Leahy, cosponsor of the final version of the Act that passed in the Senate, expressed concern during floor debate that school boards could avoid the Act's requirements by simply adopting a resolution declaring that the school does not have a limited public forum.[27] Senator Leahy noted:

> The point is that a limited open forum should be triggered by what a school does, not by what is says. The careful wording of the current draft will protect both religious and secular interests because it speaks with clarity about what a limited open forum means.[28]

Although the Act does not define "noncurriculum related," the term on which the Petitioners rely, the legislative history of the Act indicates that the term "noncurriculum related" was intended to be quite broad.[29] This is consistent with the general rule that remedial legislation should be construed liberally. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Conversely stated, curriculum related clubs are to be viewed narrowly, for example, as those which are essentially extensions of the curriculum and aid students in learning substantive course material.[30] Senator Hatfield, a cosponsor of the final version of the Act, explained during floor debate that a limited open forum "means that the school permits

[26] H. R. Rep. No. 98-710, 98 Cong., 2d Sess. 6 (1984).

[27] 130 *Cong. Rec.* S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy).

[28] *Id.*

[29] "Meeting[s]," used twelve times in section 4071, is defined to include "activities . . . not directly related to the school curriculum." 20 U.S.C. § 4072(3).

[30] *See* discussion in Strossen, *supra* note 24, at 161-62.

legitimate activities outside of the instructional activities of the school." [31] Later in the debate Senator Hatfield again referred to periods of "noninstructional activity" and went on to describe curriculum related clubs as those that are "really a kind of extension of the classroom." [32] Congressman Goodling, a former educator and floor manager of the Act, during debate in the House explained noncurriculum related to require that "the school or a school teacher require or directly encourage student participation in such group in connection with curriculum course work." [33]

Significantly, for the purposes of this case where a chess club exists, the legislative history of the Act clearly indicates that the existence of chess clubs at a school would trigger application of the Act.[34] Senator Hatfield stated: "I cannot readily conceive of a criterion that could be used at this time to establish that [a chess club] as a curriculum related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another." [35] The latter sentence further illustrates Congressional concern with the potential manipulation of the Act by school officials in order to circumvent its intended purposes.

Interpreting "noncurriculum related" in terms of whether or not there is a *direct* relationship with a school's curriculum courses is fully consistent with the language of the Act and its legislative history. The relatively broad definition of the types of student clubs that

[31] 130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield).

[32] *Id.*

[33] 130 *Cong. Rec.* H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling).

[34] 130 *Cong. Rec.* S8342 (daily ed. June 27, 1984) (statements of Sens. Gorton and Hatfield).

[35] *Id.*

will trigger an equal access obligation under the Act differs significantly from the constitutional decisions,[36] most notably *Hazelwood School Dist. v. Kuhlmeier*, *supra*, on which Petitioners and the district court below so heavily rely.[37]

3. *A Limited Public Forum Within the Meaning of the Act Existed at Westside High School.*

Pursuant to a broad general policy which recognizes student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills," Westside High School allows its students to form their own clubs. *Mergens*, 867 F.2d at 1077. At the time of the students' request to form a Bible study club a variety of student clubs (approximately 30) existed at Westside High School, including the chess club, Interact (a service club connected to Rotary International), Zonta (the female counterpart to Interact), Subsurfers (a club for students and community members interested in scuba diving), a Student Advisory Board and a Student Forum. *Id.* If any one of these clubs is noncurriculum related, a limited public forum exists for the purposes of the Act. 20 U.S.C. § 4071(b).

As discussed above, noncurriculum related student groups are those that do not have a direct relationship to the curriculum course work of the school. Although the clubs cited above arguably are consistent with the broad educational goal of "developing citizenship, wholesome attitudes, good human relations, knowledge, and

[36] Strossen, *supra* note 24 at 162.

[37] Referring to *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), the district court found that the facts in this case did not establish that Westside High School has a policy or practice of "indiscriminate use" of its facilities by student organizations or the general public. *Mergens*, Pet. App. B 25. This reasoning is not relevant to the application of the Act, which does not incorporate the "indiscriminate use" standard suggested in *Hazelwood*.

skills" which may indirectly be helpful in some course work, this is not enough to avoid the requirements of the Act. "Meeting" is defined in the Act to include "those activities of student groups which . . . are not directly related to the school curriculum." 20 U.S.C. § 4072(3). Therefore unless there is a more direct relationship between the clubs and the school's curriculum course work, Westside High School may not avoid its obligation to allow nondiscriminatory equal access under the Act.

In the district court school officials here attempted to justify their actions by explaining that (i) Interact and Zonta are related to sociology and psychology, and that participation can result in better grades; (ii) the chess club provides an arena for logical thinking and is, therefore, an extension of a logic class;[38] (iii) Subsurfers is related to the goals of the physical education department; and (iv) the Student Advisory Board and Student Forum are generally related to democracy, citizenship and indirectly to the classes on government. *Mergens*, Pet. App. B 21-22. The principal of Westside High School testified that, in his opinion, all clubs and activities at the school are curriculum related and are important to the overall goals and mission of the school because children who partake of activities seem to be more successful in later life. *Id.* at 23. The district court found that all of the clubs "apparently have sponsors" although "the involvement of sponsors varies from club to club." *Id.* at 22.

It is not hard to understand why the Eighth Circuit found unpersuasive the district court's reasoning that the Act did not apply. *Mergens*, 867 F.2d at 1078. The expansive approach to curriculum relatedness espoused by the Westside school officials, and adopted by the district court, provides "a vaporous non-standard . . . that in-

[38] The Eighth Circuit concluded that Westside High School does not have a logic class. *Mergens*, 867 F. 2d at 1078.

vites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination. . ." *Hazelwood School Dist.*, 108 S. Ct. at 578 (Brennan, J., dissenting). As the Eighth Circuit recognized, a broad interpretation of "curriculum-related" renders the Act meaningless. *Mergens*, 867 F.2d at 1078. The result urged by Petitioners is precisely that which Congress sought to avoid, *i.e.*, school officials could easily circumvent the intent and application of the Act by simply requiring sponsors for voluntary student groups and proclaiming the groups to be part of the curriculum (and therefore curriculum related).[39] "A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group." *Id.*

The activities of several clubs were not directly related to the school curriculum course work and thus a limited public forum under the Act existed at Westside High School. 20 U.S.C. §§ 4071(b), 4072(3). Having created a limited public forum, Westside High school violated the Equal Access Act by prohibiting students from forming a Bible study club and meeting voluntarily after regular school hours. The Eighth Circuit held that "[Westside High School] maintains a limited open forum, and the [Equal Access Act] forbids discrimination against appellants' proposed club on the basis of its religious content." *Mergens*, 867 F.2d at 1079. This conclusion is entirely consistent with the statutory language of the Act and the legislative intent to prohibit discrimination and to accommodate religious discussion by students.

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[39] "School officials, however, may not circumvent the intent and application of this Act by officially sponsoring all similar but non-religious student-initiated groups." H. R. Rep. No. 98-710, 98th Cong., 2d Sess. 6 (1984).

II. ALLOWING A VOLUNTARY STUDENT BIBLE STUDY GROUP TO MEET DURING NONINSTRUCTIONAL TIME DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE. THE ACT EFFECTS AN ACCOMMODATION OF LEGITIMATE FREE EXERCISE CONCERNS IN A WAY THAT PROTECTS RELIGIOUS LIBERTY THROUGH VOLUNTARY ACTIVITY.

Congress intended to combat the national problem of discrimination against voluntary student religious groups when it adopted the Act. The Act requires only that public secondary schools accommodate student religious groups by allowing them to meet voluntarily after school on the same basis as other noncurriculum related student groups. 20 U.S.C. § 4071. The Act's affirmative requirement is consistent with the bedrock accomodation principle enshrined in this Court's decisions. The "Constitution . . . affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). Notwithstanding this constitutional directive, petitioners complain that avoiding discrimination through the minimal accommodation required by the Act is violative of the Establishment Clause. Effectively, Petitioners seek "to enforce a regime of total separation," *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973), a result this Court has consistently rejected. *Lynch v. Donnelly*, 465 U.S. at 673. Such an approach violates the accommodation principle, and is not required under traditional Establishment Clause analysis.

A. Allowing Students to Meet Under the Act Does Not Violate the Establishment Clause.

Petitioners assert as a defense to application of the Act that allowing students to form a Bible study club and to meet would violate the Establishment Clause. This assertion is flatly contrary to settled authority and analy-

sis under this Court's most recent decisions. *Widmar* held that providing equal access did not violate the Establishment Clause, 454 U.S. at 272-75, and further concluded that the state's interest in avoiding the promotion of religion at state expense, even if it applied in those circumstances, was not sufficiently compelling to justify content-based discrimination against students' religious speech.[40] 454 U.S. at 276. The Court's reasoning in *Widmar* applies with equal force in the present case.

Assuming that it should apply at all (see Argument II.B, *infra*), the three-part *Lemon* Establishment Clause test[41] is satisfied. An equal access policy at Westside

[40] This brief does not address the free speech and free association issues presented in this case in detail except to note that the facts of the present case distinguish it from *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), where closed forums existed. Both of those cases involved school initiated activities, a school newspaper published in connection with a journalism class in *Hazelwood* and an assembly that was part of a school sponsored educational program in self-government in *Fraser*. These activities "may fairly be characterized as part of the school curriculum . . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood*, 108 S. Ct. at 570. This *amicus* does agree that the Eighth Circuit, relying on *Widmar*, correctly decided these issues.

[41] *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In the past this *amicus* has criticized the test in briefs *amicus curiae* as being fraught with imprecision and difficulty. Although the most common decisional tool in the last two decades, it is unwieldly and has led to results inconsistent with each other as well as our nation's history and traditions.

Beginning in *Lemon* itself, Justice White criticized the "excessive entanglement" prong of the test on the grounds that it creates an "insoluble paradox." 403 U.S. at 668. In her concurrence in *Wallace v. Jaffree*, Justice O'Connor noted that *Lemon's* standards should be "reexamined and refined" to make them more useful in achieving First Amendment goals. 472 U.S. 38, 68-70 (1985). Chief Justice Rehnquist sharply criticized each prong of the *Lemon* test, and highlighted its paradoxical results. 472 U.S. at 108-13. Justice Scalia was sharply critical of the test in *Edwards v. Aguillard*, 107 S. Ct. 2573, 2593-96 (1987). Justice Kennedy has recently questioned the validity of the test in his dissent in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3134 (1989). Whether this case is the vehicle for a reevaluation is debatable, because there is a more straightforward way to dispose of the case under an alternative accommodation analysis.

High School is entirely consistent with the school's secular purpose of "developing wholesome attitudes, good human relations, knowledge and skill." *Mergens*, 867 F. 2d at 1077. Such a policy would not have the primary effect of advancing religion. That the benefits are available to a variety of nonreligious student groups (approximately 30) at the high school indicates a primary secular, not religious effect. *See Widmar*, 454 U.S. at 273-74. A limited open forum at a public secondary school "does not confer any imprimatur of state approval on religious sects or activities." *Id.* at 274.[42] The students here do not seek the school's active sponsorship or involvement in their activities,[43] but in effect only its recognition and the ability to use school facilities to meet. Finally, an equal access policy is less likely to entangle Westside High School with religion than a policy of religious censorship and discrimination which would require the school not only to define religious speech but also to engage in continued monitoring of voluntary student groups to ensure that no religious speech or discussion. *See id.* at 272 n.11.

Factually, the only real distinction between this case and *Widmar* is the difference in ages between high school and university students. This is a distinction with-

[42] *See County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989) (plurality). A challenged governmental action can violate the Establishment Clause if it "has the effect of endorsing or disapproving religious beliefs." *Id.* at 3103.

[43] The students stressed to the School Board that they were not requesting a faculty sponsor unless required by school policy. If one were required, it would only be needed for custodial purposes. *Mergens*, 867 F.2d at 1077.

out a legal or social difference because the district court below agreed with the expert testimony that "there is no significant differences [sic] between high school and college students in their abilities to understand endorsement or nonendorsement by the school." *Mergens*, Pet. App. B 12.

The argument that high school students are likely to confuse equal access with state sponsorship of religion was explicitly rejected by the Senate Judiciary Committee. "Authors writing in leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism." S. Rep. No. 98-357, 98th Cong., 2d Sess. 8 (1984).[44] Given the Congressional judgment and the findings of the district court, simply allowing students to meet voluntarily on their own after instructional time to study the Bible among themselves does not convey, and may not be reasonably perceived as, an official endorsement of religion by the school. In addition, the district court also found that "the proposed format protects against the conferring of an imprimatur or school approval." Pet. App. B 11 n.1. Ironically, in order to avoid what they perceive to be an Establishment Clause problem, the actions of the school officials here have instead created the Establishment Clause problem by inhibiting religious activity and conveying a message of disapproval of religious activity to both the students involved and the community at large.[45]

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[44] On the question of impressionability of students, Justice Powell, author of the majority opinion in *Widmar*, noted in *Bender v. Williamsport Area School Dist.*, that "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." 475 U.S. 534, 556 (1986) (Powell, J., dissenting).

[45] *See County of Allegheny v. American Civil Liberties Union, supra* note 42.

B. Accommodation of Voluntary Student Religious Groups Protects Religious Liberty Guaranteed by the First Amendment. The Establishment Clause May Not and Should Not Be Used As a Tool to Inhibit the Free Exercise of Religion.

The two Religion Clauses must be construed harmoniously to further their common goal of ensuring religious liberty. "[T]he Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government." *Wisconsin v. Yoder*, 406 U.S. at 214. Accommodation was firmly established as a constitutional principle in *Zorach v. Clauson* where the Court held that when the state accommodates the public service to the spiritual needs of its citizens, it follows the best of this country's traditions—"[t]o hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups." 343 U.S. 306, 314 (1952). "Government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 144-45 (1987). "Any interpretation of [the Establishment Clause] and the constitutional values it serves must also take into account the free exercise clause and the values it serves. P. Kauper, *Religion and the Constitution*, 79 (1964)." *Meek v. Pittenger*, 421 U.S. 349, 395 (1975) (Rehnquist, J., dissenting).

Without more, simply accommodating the religious beliefs of religious groups can hardly be characterized as sponsorship or endorsement of, or active involvement with, religion violative of the Establishment Clause. *See Wisconsin v. Yoder*, 406 U.S. at 234 n. 22. "[T]he Free Exercise Clause . . ., by its terms, gives special protection

to the exercise of religion." *Thomas v. Review Board*, 450 U.S. 707, 713 (1980). The right to free exercise of religion undoubtedly includes scripture reading and study of the Bible. Congress was concerned that for public school authorities to discriminate on the basis of the religious content of speech at voluntary student-initiated meetings would constitute a violation of the right to free exercise of religion of the students involved. Thus, the Act had as its core the accommodation of religion.[46]

This *amicus* has been concerned for some time with the danger that the Establishment Clause can and has been used to undermine the accommodation principle. This danger stems in part from the unfortunate incorporation of "Jefferson's misleading [wall of separation] metaphor" into constitutional adjudication. *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, C.J., dissenting). The "Constitution [does not] require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly*, 465 U.S. at 673. Unfortunately the impression has been created for some that "the Establishment Clause not only mandates religious neutrality but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one. Nothing in the First Amendment . . . requires such an extreme result." *Meek v. Pittenger*, 421 U.S. at 395.

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[46] Although the Court need not decide it here, accommodation is not boundless and in some situations efforts to accommodate religious beliefs are found to violate the Establishment Clause. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985), where a state statute which provided Sabbath observers with an absolute and unqualified right not to work on their Sabbath was held to violate the Establishment Clause. That is, however, clearly distinguishable from mandating equal treatment for religious and non-religious groups.

The Establishment Clause cannot be read to include "a [governmental] philosophy of hostility to religion," *Zorach v. Clauson*, 343 U.S. at 315, yet it has been used in such a way to create just that impression. Certain groups routinely threaten public school officials with expensive and protracted litigation over almost every matter involving religion and public schools. It is no wonder that the Senate Judiciary Committee found that the "critical rights of freedom of speech and free exercise of religion are being denied in the very places where they should be taught, our Nation's schools, not because school authorities are hostile to religion, but because they fear expensive lawsuits."[47] Witness after witness testified before the Senate Judiciary Committee about the existence of the tragic perception of state hostility toward religious speech among students and citizens.[48] This is an especially dangerous trend because it isolates religion from the educational process at a time when values are formed and conscience is molded:

> [T]o be silent about religion may be, in effect, to make the public school an antireligious factor in the community. Silence creates the impression in the minds of the young that religion is unimportant and has nothing to contribute to the solution of the perennial and ultimate problems of human life.[49]

Whether the almost phobic treatment of religious speech and religious groups by some public school officials results from a genuine fear of Establishment Clause litigation, or indifference or outright hostility to religion, is not the issue. Whatever the reason the result is the same—students are subjected to discrimination and their

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[47] S. Rep. 98-357, 98th Cong., 2d Sess. 14 (1984).

[48] *Id.* at 10.

[49] *American Council on Education, The Function of the Public Schools in Dealing With Religion*, 6 (1953). *See* S. Rep. No. 357, 98th Cong., 2d Sess. 14-21 (1984).

First Amendment rights are being trampled, often times in the name of the Establishment Clause as happened in this case at Westside High School. This is precisely what Congress sought to remedy when it enacted the Equal Access Act.

The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status, as subversive of American ideals and therefore subject to unique disabilities. *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring). Not "a sword to justify repression of religion, the Establishment Clause, properly understood [as buttressing the Free Exercise Clause], acts as a shield against any attempt to inhibit religion," *id.*, as the public school officials attempted in this case. "[I]t seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the framers." L. Tribe, *American Constitutional Law*, § 14-8, p. 1204 (2d ed. 1988)[50]

By denying the students here the opportunity to meet voluntarily after regular school hours, Petitioners have demonstrated precisely the "callous indifference" and "hostility to religion" against which *Zorach* warned. 343 U.S. 314-315. This Court should not and cannot allow government actions, such as those of Petitioners, to pervert the Establishment Clause into a tool against religion and thereby erode the accommodation principle which is at the core of the Religion Clauses and our public life.

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[50] During consideration of the Act Professor Tribe testified that for public school authorities to discriminate on the basis of the religious content of speech at voluntary student-initiated meetings would constitute a violation of the right to free exercise of religion of the students involved. *Hearings Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor, House of Representatives, on H.R. 4996*, 98th Cong., 2d Sess. 45 (1984).

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

Respectfully submitted,

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No. 88–1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF DR. DAVID MOSHMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE

David Moshman, Ph.D., is a professor of educational psychology at the University of Nebraska-Lincoln. Dr. Moshman is an authority on adolescent psychology with a special focus on the First Amendment rights of children. He is the author of *Children, Education, and the First Amendment* (1989), editor of *Children's Intellectual Rights* (1986) and author, with John Glover and Roger Bruning, of *Developmental Psychology* (1987).

Based upon his extensive research on the subject of children and the First Amendment, Dr. Moshman has come to the conclusion that secondary school-age children are quite competent to understand that schools are not condoning a particular religion by allowing a student initiated Bible study club to meet on school grounds. In fact, it is Dr. Moshman's view that children, at least of high school age, have a constitutionally-protected right to meet on school grounds and discuss, on a voluntary, extracurricular basis, religious topics.

QUESTION PRESENTED

I. ARE SECONDARY STUDENTS RELEVANTLY DIFFERENT FROM COLLEGE STUDENTS IN THEIR ABILITY TO UNDERSTAND THAT A SCHOOL POLICY ALLOWING STUDENT INITIATED BIBLE STUDY CLUBS TO MEET ON CAMPUS DOES NOT SUGGEST STATE APPROVAL OF THE RELIGIOUS GROUP?

TABLE OF CONTENTS

Page

INTEREST OF THE AMICUS CURIAE i

QUESTION PRESENTED ii

TABLE OF AUTHORITIES ..... v-ix

CONSENT OF THE PARTIES ..... 1, note

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT

A. The Supreme Court has determined that a public university's refusal to allow religious groups to use school meeting facilities on the same basis as other groups is a violation of the Free Speech Clause 2

B. Congress considered the maturity of secondary school students in enacting the Equal Access Act 4

C. Compulsory attendance laws are not a valid reason for denying equal access to voluntary student initiated religious group meetings 8

D. With respect to general intellectual development, adolescents are more like college students and adults than like young children 9

E. An analysis of the intellectual demands of understanding an equal access policy provides no basis for reconsidering the general conclusion of adolescent intellectual competence 12

F. There is little support for the view that adolescent intellectual competence is seriously undermined by extreme emotionality or susceptibility to social influence 14

G. High school students are like college students in those psychological characteristics relevant to permitting equal access for voluntary student religious groups 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES: **Page**

Bayer v. Kinzler,
383 F.Supp. 1164 (E.D.N.Y. 1974), *aff'd mem.*,
515 F.2d 504 (2d Cir. 1975) 6

Bellotti v. Baird,
443 U.S. 622 (1979) 7

Bender v. Williamsport Area School District,
475 U.S. 534 (1986) 3, 9

Board of Education, Island Trees Union Free School District v. Pico,
457 U.S. 853 (1982) 4, 5

Brandon v. Board of Education of the Guilderland Central Schools,
635 F.2d 971 (2d Cir. 1980), *cert. denied*,
454 U.S. 1123 (1981) 9

Cantwell v. Connecticut,
310 U.S. 296 (1940) 12

Carey v. Population Services International,
431 U.S. 678 (1977) 7

Chicago Police Department v. Mosely,
408 U.S. 92 (1972) 2

Healy v. James,
408 U.S. 169 (1972) 12

James v. Board of Education,
461 F.2d 566 (2d Cir. 1972), *cert. denied*
409 U.S. 1042 (1972) 6

Koppell v. Levine,
347 F.Supp. 456 (E.D.N.Y. 1972) 8

Mergens v. Board of Education of Westside Community Schools,
867 F.2d 1076 (8th Cir. 1989) 8

N.A.A.C.P. v. Alabama,
357 U.S. 449 (1958) 12

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 7

Russo v. Central School District No. 1,
469 F.2d 623, (2d Cir. 1972) 6

School District of Abington Township v. Schempp,
374 U.S. 203 (1963) 6

Seyfried v. Walton,
668 F.2d 214, (3d Cir. 1981). 6, 8

Tilton v. Richardson,
403 U.S. 672, (1971) 3

Tinker v. Des Moines Independent School District,
393 U.S. 503 (1969) 4, 5, 6, 9

Widmar v. Vincent,
454 U.S. 263 (1981) 2

Wilson v. Chancellor,
418 F. Supp. 1358 (D. Or. 1976) 6, 7, 8

Zorach v. Clauson,
343 U.S. 306 (1952) 6, 7

CONSTITUTIONAL PROVISIONS AND STATUTES:

First Amendment, United States Constitution ..... passim

Equal Access Act, 20 U.S.C. §§ 4071-4074 (1984) ..... passim

OTHER AUTHORITIES:

Brief for the Christian Legal Society as *Amicus Curiae* Supporting Respondents in *Bender v. Williamsport Area School District, et al.*, No. 84-773 9

S. Rep. No. 357, 98th Cong. 2d Sess. (1984) 5, 6, 8, 9

M.D.S. Braine & B. Rumain, *Logical Reasoning*, 3 HANDBOOK OF CHILD PSYCHOLOGY 263 (P. Mussen, ed. 1983) 10

J. Byrnes, *Formal Operations*, 8 DEVELOPMENTAL REVIEW 66 (1988) 11

R. Campbell & M. Bickhard, *KNOWING LEVELS AND DEVELOPMENTAL STAGES* (1986) 12

R. Case, *INTELLECTUAL DEVELOPMENT* (1985) 12

J. Evans, *THE PSYCHOLOGY OF DEDUCTIVE REASONING* (1982) 11

J. Evans, *THINKING AND REASONING: PSYCHOLOGICAL APPROACHES* (1983) 11

K. Fischer, *A Theory of Cognitive Development*, 87 PSYCHOLOGICAL REVIEW 477 (1980) 12

J.P. Hill & G.N. Holmbeck, *Attachment and Autonomy during Adolescence*, 3 *ANNALS OF CHILD DEVELOPMENT* 145 (G. Whitehurst ed. 1986) 15

B. Inhelder & J. Piaget, *THE GROWTH OF LOGICAL THINKING* (1958) 11

C. Irwin, *ADOLESCENT SOCIAL BEHAVIOR AND HEALTH* (1987) 15

C. Lewis, *Minors' Competence to Consent to Abortion*, 42 Am. Psychologist 84 (1987) 15

D. Moshman, *CHILDREN, EDUCATION AND THE FIRST AMENDMENT* (1989) 10, 11

D. Moshman, *Development of Formal Hypothesis-Testing Ability*, 15 DEVELOPMENTAL PSYCHOLOGY 104 (1979) 10

D. Moshman, *The Development of Metalogical Understanding, REASONING, NECESSITY, AND LOGIC* (W. Overton ed. in press) 10

D. Moshman, *Equal Access for Religion in Public Schools? An Empirical Approach to a Legal Dilemma*, 9 DEVELOPMENTAL REVIEW (in press) 11

D. Moshman & B.A. Franks, *Development of the Concept of Inferential Validity*, 57 CHILD DEVELOPMENT 153 (1986) 10, 13, 14

D. Moshman & L.E. Lukin, *The Creative Construction of Rationality, HANDBOOK OF CREATIVITY* 183 (J. Glover, R. Ronning, C. Reynolds eds. 1989) 10

D.P. O'Brien, *The Development of Conditional Reasoning*, 20 *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 61 (H. Reese ed. 1987) 10

W. Overton, S. Ward, S. Noveck, I. Black & D. O'Brien, *Form and Content in the Development of Deductive Reasoning*, 23 DEVELOPMENTAL PSYCHOLOGY 22 (1987) 10

L.F. Rossow and N.D. Rossow, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 EDUC L. REP. 475 (1988) 13

J. Santrock, *ADOLESCENCE* (3rd ed. 1987) 15

L. Steinberg, *ADOLESCENCE* (1985) 15

A. Waterman, *IDENTITY IN ADOLESCENCE* (1985) 15

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BRIEF OF DR. DAVID MOSHMAN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF THE CASE

Amicus curiae adopts the factual presentation set forth in Respondent's Statement of the Case.

Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

SUMMARY OF ARGUMENT

Public high school students are able to understand that voluntary student initiated Bible club meetings held at their school do not imply that the state is endorsing religion in general or the particular religious groups it allows to meet.

ARGUMENT

A. THE SUPREME COURT HAS DETERMINED THAT A PUBLIC UNIVERSITY'S REFUSAL TO ALLOW RELIGIOUS GROUPS TO USE SCHOOL MEETING FACILITIES ON THE SAME BASIS AS OTHER GROUPS IS A VIOLATION OF THE FREE SPEECH CLAUSE.

This Court has determined that religious groups must be allowed to meet on public university campuses on the same basis as other organizations. *Widmar v. Vincent*, 454 U.S. 263 (1981). It is well-established that when government makes a forum available for a wide variety of expressive activities by private persons content-based exclusions from the use of such a forum are constitutionally suspect and subject to strict First Amendment scrutiny. *See e.g., Chicago Police Department v. Mosley*, 408 U.S. 92 (1972), *Widmar v. Vincent*, 454 U.S. 263, 269 (1981). Religious discussion and worship are "forms of speech and association protected by the First Amendment." *Widmar*, 454 U.S. at 269.

This Court concluded in *Widmar* that a public university's refusal to allow religious groups to use the Student Union on

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Counsel of Record for the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

the same basis as other groups was a violation of the student's freedom of speech. The university's argument that it must protect students against perceiving government endorsement of religion was specifically rejected by the Court. *Widmar*, 454 U.S. at 448-451. The Court based this finding, at least in part, upon the maturity of college students. In a seminal footnote the Court held:

> "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion . . . *See Tilton v. Richardson*, 403 U.S. 672 at 685-686 (1971). In light of the large number of groups meeting on campus . . . we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place. *Id.* at 275.

The concern expressed by the Court in the *Widmar* "impressionability footnote" is that young children observing student-initiated religious study groups meeting at their school might infer that the school was endorsing religion in general or the particular religious groups allowed to meet. This Court and Justice Powell, author of the *Widmar* footnote, have retreated from the implication that students under college age may not be able to appreciate a school's policy of neutrality toward religion. Justice Powell, specifically rejecting the inference in *Widmar* that younger students may be more impressionable than their college age counterparts, states in his dissent to *Bender v. Williamsport Area School District*, 475 U.S. 534, 559 (1986):

We did note in *Widmar* that university students are "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion". *Widmar* at 274, n.14.

Other decisions, however, have recognized that the First Amendment rights of speech and association extend also to high school students. *See, e.g., Board of Education, Island Trees Union Free School v. Pico*, 457 U.S. 853, 864, 102 S.Ct. 2799, 2806, 73 L.Ed. 2d, 435 (1982) (opinion of Brennan, J.); *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506-507, 80 S.Ct. 733, 736, 21 L.Ed. 2d, 731 (1969) (citing cases). I do not believe — particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar*.

B. CONGRESS CONSIDERED THE MATURITY OF SECONDARY SCHOOL STUDENTS IN ENACTING THE EQUAL ACCESS ACT.

The Equal Access Act, 20 U.S.C. §§ 4071 - 4074 (1984), makes it unlawful to deny equal access to students in public secondary schools who wish to meet voluntarily for religious purposes. By enacting the Equal Access Act, Congress extended the *Widmar* holding, requiring equal access on university campuses, to secondary schools. In deciding to mandate equal access for religious groups on high school campuses, Congress considered the maturity of secondary school students and concluded that they were not relevantly different from college students.

Congress noted, in the legislative history of the Act, various Supreme Court decisions recognizing that high school students have protected First Amendment rights of free speech and association even when that speech is of a religious nature.[1] For instance, in *Tinker v. Des Moines Independent School District*, 393 U.S. 503, 506 (1969), a high school student's right to wear a black armband protesting the Vietnam War was upheld despite the clear religious and political overtones of the gesture. Similarly in *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), this Court held that secondary school students were able to view explicit materials contained in school library books without concluding that the school adopted or approved of the views presented in the materials.

The ability of high school students to exercise independent judgment has been frequently noted by the courts:

> the court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the latter grades of secondary schools. As a result, more deference should be shown school authorities' curricular decision regarding grade schools, and perhaps junior high school students, in the face of a challenge that a particular point of view has been excluded. High school students, in contrast, are at an age approaching both adulthood and franchise. As the Second Circuit has noted in a related context, "it would be foolhardy to shield our children from political debate and issues until the eve of their first venture into the voting booth. Schools must

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[1] S. Rep. No. 357, 98th Cong. 2d Sess. 34-45 (1984).

play an essential role in preparing their students to think and analyze and to recognize the demagogue".[2]

High school students are capable of hearing various forms of expression without attaching a school endorsement of the form of expression. *See generally, Tinker*, 393 U.S. at 511 (students are not "closed circuit recipients of only that which the State chooses to communicate"). This Court has held that students are capable of understanding that the study of the Bible as history or literature in public school courses does not lead to an inference of state endorsement of religious teachings. *School District of Abington Township v. Schempp*, 374 U.S. 203 at 225 (1963). In *Zorach v. Clauson*, 343 U.S. 306, 311 (1952), this Court held that released time programs for religious instruction during the school day did not carry the imprimatur of state approval of religion.

Since students are capable of understanding that allowing forms of political or religious protest does not connote state involvement or approval (*see Tinker*), that placement of explicit and controversial materials in a school library does not indicate state approval or agreement with those materials (*see Pico*), and that the state's permission for students to leave school grounds

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[2] *Seyfried v. Walton*, 668 F.2d 214, 219-20 (3d Cir. 1981); (Rosenn, J., concurring) (footnote). *See also, Russo v. Central School District No. 1.*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied.*, 411 U.S. 932 (1973) (teacher's refusal to lead flag salute would not have a destructive effect on students); *James v. Board of Education*, 461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); *Bayer v. Kinzler*, 383 F.Supp. 1164 (E.D.N.Y 1974), *af'd. mem.*, 515 F.2d 504 (2d Cir. 1975) (striking down restriction on information about contraception and abortion published in school newspapers); *Wilson v. Chancellor*, 418 F. Supp. 1358 (D.Or. 1976) (school ban on political speakers during high school classes struck down). *See also*, S. Rep. No. 357, 98th Cong. 2d Sess. 35 (1984).

for religious instruction does not indicate state support of that particular religion (*see Zorach*), then high school students should be credited with the ability to understand that by allowing a religiously-oriented group to meet on school grounds in the same manner as other organizations, the state does not endorse that religious group.

Students of high school age are currently bestowed with many rights of an adult nature. This Court has repeatedly recognized that high school students are confronted with many adult situations and are entitled to exercise their independent judgment concerning those situations. A mature minor may currently decide to have an abortion without parental notification or state consent. See *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). Statutory prohibitions against the sale of contraceptives to minors have been held unconstitutional, thus allowing high school students to make decisions concerning birth control. *Carey v. Population Services International*, 431 U.S. 678 (1977). If students of high school age are capable of and entitled to making the important decisions listed above, they are certainly capable of distinguishing state neutrality from state support of a student initiated Bible study group.

The courts have held with consistency that secondary school students are remarkably insightful and are able to hear varied sources of information without perceiving those views as having their school's endorsement. The courts have noted with regularity the "surprisingly sophisticated, intelligent, and discerning" nature of high school students. *Wilson v. Chancellor*, 418

F.Supp. 1358, 1368 (D.C. Or. 1976).[3] The Eighth Circuit, in reversing the district court in this case, determined that Congress considered any differences in maturity between university students and secondary students before enacting the Equal Access Act.[4]

C. COMPULSORY ATTENDANCE LAWS ARE NOT A VALID REASON FOR DENYING EQUAL ACCESS TO VOLUNTARY STUDENT INITIATED RELIGIOUS GROUP MEETINGS.

The issue of compulsory attendance laws has been raised as a reason to deny access to religious groups seeking to meet

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[3] In upholding a guest speaker's right to address the issue of communism, the *Wilson* court noted that hight school students were not susceptible to adopting the speaker's views as those of the school. *See also, Seyfried v. Walton*, 668 F.2d 214, 219 (3d Cir. 1981) (Rosenn, J., concurring) ("the Court can take judicial notice of the progressively higher levels of intellectual and emotional development of students in the later grades of secondary school"); *Koppell v. Levine*, 347 F.Supp. 456, 464 (E.D.N.Y. 1972) (recent "legislation, judicial decisions and evolving social attitudes" have altered traditional views of students rights).

[4] *Mergens v. Board of Education of Westside Community Schools*, 867 F.2d 1076, 1080 (8th Cir. 1989). The argument that less mature high school students are likely to confuse equal access policy with state sponsorship of religion was explicitly rejected by the Senatorial Committee on the Judiciary in its report of the Equal Access Act:

> Authors writing in the leading legal periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion, not one of State favoritism. S. Rep. No. 357, 98th Cong. 2d Sess. 8 (1984).

on secondary school grounds.[5] This reasoning is based on the false assumption that "compulsory attendance laws transform all extracurricular student meetings into coercive activities".[6]

Even if club activity takes place during compulsory attendance hours, the existence of a compulsory attendance law does not compel a student to attend a voluntary club meeting. Voluntary student activity during or outside of school hours is not a mark of state sponsorship.[7] As stated in the legislative history of the Equal Access Act, "the concern with school hours is connected with the Court's concern that the State, through its compulsory attendance laws, is providing a 'captive audience' for any such voluntary religious activity. This fear is, of course, groundless in the case of truly voluntary student initiated, religious activities at any time, and demonstrably so before or after school hours, since students are not even required to be on school property at these times."[8]

D. WITH RESPECT TO GENERAL INTELLECTUAL DEVELOPMENT, ADOLESCENTS ARE MORE LIKE COLLEGE STUDENTS AND ADULTS THAN LIKE YOUNG CHILDREN.

Psychological research strongly suggests that, with respect to basic cognitive maturity, adolescents are more like college

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[5] See *Brandon v. Board of Education of the Guilderland Central Schools*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

[6] Brief for the Christian Legal Society as *Amicus Curiae* Supporting Respondents in *Bender v. Williamsport Area School District, et al.*, No. 84-773.

[7] *Tinker*, 393 U.S. at 511.

[8] S. Rep No. 357, 98th Cong. 2d Sess. 9 (1984).

students and adults than like younger children. Research on intellectual development comprises thousands of published studies involving hundreds of thousands of individuals ranging in age from birth through adulthood. Such individuals have been assessed in a wide variety of ways with respect to their understanding of various abstract concepts and their ability to engage in a variety of forms of deductive, inductive, and moral reasoning.[9] Children aged 9 or 10 commonly fail to grasp concepts that are spontaneously understood or easily learned by college students. The younger children show systematic and persistent errors in reasoning that are rare or easily correctable in adults. Beginning around age 10 to 12, on the other hand, mature reasoning is often found and differences from adult reasoning can usually be eliminated with brief instruction or feedback.[10]

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[9] See, M.D.S. Braine & B. Rumain, *Logical Reasoning*, 3 *HANDBOOK OF CHILD PSYCHOLOGY*, 263 (p. Mussen, ed. 1983); D. Moshman, *CHILDREN, EDUCATION, AND THE FIRST AMENDMENT*, 62-91 (1989); D. Moshman, *The Development of Metalogical Understanding, REASONING NECESSITY, AND LOGIC* (W. Overton, ed. in press); D. Moshman & L.E. Lukin, *The Creative Construction of Rationality, HANDBOOK OF CREATIVITY* 183 (J. Glover, R. Ronning, C. Reynolds, eds. 1989); D.P. O'Brien, *The Development of Conditional Reasoning*, 20 *ADVANCES IN CHILD DEVELOPMENT AND BEHAVIOR* 61 (H. Reese, ed. 1987).

[10] See e.g., D. Moshman, *Development of Formal Hypothesis-Testing Ability*, 15 DEVELOPMENTAL PSYCHOLOGY 104 (1979); D. Moshman & B.A. Franks, *Development of the Concept of Inferential Validity*, 57 CHILD DEVELOPMENT 153 (1986); W. Overton, S. Ward, S. Noveck, I. Black & D. O'Brien, *Form and Content in the Development of Deductive Reasoning*, 23 DEVELOPMENTAL PSYCHOLOGY 22 (1987).

Adolescent reasoning is far from perfect, of course, but so is that of adults.[11] To the extent that adolescents deviate from standards of rationality, their deviations are of the same sort commonly found in adults. Differences between the average adolescent and the average adult are relatively small compared to the variability within each group. The sort of clear, qualitative differences from adult reasoning that might justify a sharp legal distinction are simply not found beyond the age of about 10 or 11.[12]

Theories of cognitive development are generally consistent with this picture. The evidence that a level of cognition comparable to that of adults is typically reached about age 11 or 12 is consistent with the classic research of Jean Piaget, the child psychologist whose theory postulates that the stage of formal operations, the culmination of cognitive development, is achieved at this age.[13] Although some aspects of Piaget's theory have been questioned, the idea that the transition to a level of abstraction typical of adult reasoning occurs no later than

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[11] J. Evans, *THE PSYCHOLOGY OF DEDUCTIVE REASONING* (1982); J. Evans, *THINKING AND REASONING: PSYCHOLOGICAL APPROACHES* (1983).

[12] D. Moshman, *CHILDREN, EDUCATION AND THE FIRST AMENDMENT* at p. 78; D. Moshman, *Equal Access for Religion in Public Schools? An Empirical Approach to a Legal Dilemma*, 9 DEVELOPMENTAL REVIEW (in press).

[13] B. Inhelder & J. Piaget, *THE GROWTH OF LOGICAL THINKING* (1958); see also J. Byrnes, *Formal Operations*, 8 DEVELOPMENTAL REVIEW 66 (1988).

age 11 or 12 has been maintained in the major current theories.[14]

E. AN ANALYSIS OF THE INTELLECTUAL DEMANDS OF UNDERSTANDING AN EQUAL ACCESS POLICY PROVIDES NO BASIS FOR RECONSIDERING THE GENERAL CONCLUSION OF ADOLESCENT INTELLECTUAL COMPETENCE.

The key empirical issue in the present case is the ability of high school age students to understand the distinction between (a) voluntary student groups permitted to use school premises and (b) official school activities endorsed by the school. This distinction involves understanding the idea of a forum that is created by and physically included within the school but that is open to a variety of groups and ideas. The specific legal concept implicated here is the First Amendment principle that government must permit freedoms of belief, expression, and association,[15] and may not restrict such activity on the basis of the content of those beliefs, the content of what is expressed, or the types of people with whom one wishes to associate.[16]

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[14] R. Campbell & M. Bickhard, *KNOWING LEVELS AND DEVELOPMENTAL STAGES* (1986); R. Case, *INTELLECTUAL DEVELOPMENT* (1985); K. Fischer, *A Theory of Cognitive Development*, 87 PSYCHOLOGICAL REVIEW 477 (1980).

[15] First Amendment, United States Constitution. "While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly and petition." *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 460 (1958).

[16] See, *Healy v. James*, 408 U.S. 169, 180 (1972); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

Although there appears to be no research specifically examining the development of understanding First Amendment principles,[17] there have been many studies on the development of similarly abstract concepts. Most directly relevant, perhaps, is research on the ability consciously and systematically to distinguish form from content. In a representative recent study, students in grades 4, 7, and college were asked to sort and rank a variety of logical arguments.[18] The arguments varied in both form and content. The key issue was the students' ability to understand the concept of validity *i.e.*, whether the conclusion followed from the premises. Most college students spontaneously understood the concept of validity. Many seventh graders (ages 12-13) showed spontaneous understanding as well.[19] Fourth graders (ages 9-10), on the other hand, never showed spontaneous understanding of validity and rarely profited from additional guidance provided in follow-up studies.

In sum, a case can be made that children up to about age ten are qualitatively different from adults in that they are incapable of fully comprehending a variety of abstract concepts.

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[17] One recent survey did examine student perceptions of their high school's existing policies with respect to nonreligious student groups and asked the students to speculate about school attitude toward hypothetical student religious groups. The authors classified 66% of the students as having "perceived absolute neutrality" with respect to religion and only 2% as having "perceived no neutrality". L.F. Rossow & N.D. Rossow, *High School Prayer Clubs: Can Students Perceive Religious Neutrality?*, 45 EDUC. L. REP. 475 (1988).

[18] D. Moshman & B. Franks, *supra*.

[19] With brief instruction regarding the concept of validity provided in follow-up studies, seventh grade performance was statistically indistinguishable from that of college students. *Id.*

Adolescents, on the other hand, are likely spontaneously to use adult concepts. Even if the adult concept is novel to the adolescent, he or she can usually grasp and apply the concept after a brief explanation.[20] Available evidence does not support a sharp legal distinction between high school and college students. There is no reason to think that high school students will naively assume that all groups meeting in a school are thereby endorsed by the school or that they are encouraged to join all such groups. On the contrary, it seems likely that the students of Westside High School are sufficiently mature to grasp the voluntary nature of extracurricular activities even when some of those activities involve religion.

F. THERE IS LITTLE SUPPORT FOR THE VIEW THAT ADOLESCENT INTELLECTUAL COMPETENCE IS SERIOUSLY UNDERMINED BY EXTREME EMOTIONALITY OR SUSCEPTIBILITY TO SOCIAL INFLUENCE.

Popular myths hold that adolescence is a period of extraordinary emotional turbulence and instability and that adolescents unthinkingly accede to peer pressure on all matters. Psychological research has largely undermined these myths. Adolescents do face difficult developmental challenges, but so do children and adults. Adolescents often do rebel against (what they perceive as) unreasonable constraints, but so do children and adults. Some adolescents do have deep emotional problems, but so do some children and adults. There is general agreement among psychologists that adolescence does not routinely involve a unique level of stress and turmoil.[21]

[20] *Id.*

Similarly, there is little support for the view that adolescents are at the mercy of their peers or incapable of autonomous decision-making.[22] It is true that, compared to younger children, adolescents are less dependent on adults and more oriented toward their peers. But adults value and attend to their peers as well. Susceptibility to social influence is a general characteristic of human beings, not a unique trait of adolescents. There is little basis for the view that high school students are sharply distinct from college students or adults in their susceptibility to peer pressure or are impressionable to a degree that undermines earlier religious inculcation by parents or that threatens autonomous decision-making in the area of religious beliefs and values.

G. HIGH SCHOOL STUDENTS ARE LIKE COLLEGE STUDENTS IN THOSE PSYCHOLOGICAL CHARACTERISTICS RELEVANT TO PERMITTING EQUAL ACCESS FOR VOLUNTARY STUDENT RELIGIOUS GROUPS.

Hence, it appears that high school students are comparable to college students in their ability to understand the vol-

[21] C. Irwin, *ADOLESCENT SOCIAL BEHAVIOR AND HEALTH* (1987); J. Santrock, *ADOLESCENCE* (3rd ed. 1987); L. Steinberg, *ADOLESCENCE* (1985).

[22] J.P. Hill & G.N. Holmbeck, *Attachment and Autonomy during Adolescence*, 3 *ANNALS OF CHILD DEVELOPMENT* 145 (G. Whitehurst ed. 1986); C. Lewis, *Minors' Competence to Consent to Abortion*, 42 AM. PSYCHOLOGIST 84 (1987); A. Waterman, *IDENTITY IN ADOLESCENCE* (1985).

untary nature of extracurricular student religious groups and there is no evidence of social or emotional factors sufficient to undermine such understanding. Concerns about a perceived establishment of religion can be handled through explicit disclaimers and regulation of meeting times and places rather than through the more restrictive alternative of forbidding voluntary student religious groups.

In enacting the Equal Access Act, Congress extended the approach of *Widmar* to the secondary level but not to the elementary level. It thus recognized the impressionability of young children but decided that, with respect to equal access, a distinction should be made between children and adolescents rather than between adolescents and college students. This conclusion appears to be fully consistent with current psychological research.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 88–1597

IN THE

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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

I. Consent of the Parties ..... viii, note

II. Table of Contents i

III. Table of Authorities ..... iii-vii

IV. Interest of Amicus Curiae viii

V. Summary of Argument ..... ix-xi

VI. Argument 1

Permitting Extracurricular Religious Activities in the Public Schools Respects the Free Speech, Free Exercise, Free Association and Equal Protection Rights of the Students Involved Without Violating Establishment Principles 1

A. Neutral Principleism Favors the Equal Treatment of Religious Extracurricular Clubs 3

1. Defects of the Curriculum Related Argument 4

2. The Errors Inherent in the Endorsement Issue 8

B. Accommodationism Recommends Tolerance of Religious Extracurricular Clubs as a Non-Preferential Means of Avoiding Interference with the Religious Needs of Students 12

C. Separationism is not Jeopardized Where Equal Treatment of Religious Clubs Serves Secular Purposes, Has a Secular Effect and Does Not Entail Entanglement 18

D. Reconciliation Mandates the Reconciliation of Student Rights With Establishment Principles Such That the Civil Religion of Secular Humanism is not Given Preferential Treatment as a Justification for Excluding Religious Extracurricular Activities 20

VII. Conclusion 30

TABLE OF AUTHORITIES

SUPREME COURT CASES **Page**

Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963) 6, 26

Bender v. Williamsport Area School Dist., 106 S.Ct. 1326, 1337 (Burger, C.J., dissenting) 7

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 11, 19

Cornelius v. NAACP Legal Defense & Education Fund, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)) 7

Corporation of Presiding Bishop v. Amos, 107 S.Ct. 2862, 2870 (1987) 12, 14, 16

Engle v. Vitale, 370 U.S. 421, 437 (1962) (Douglas, J., concurring) 12

Everson v. Board of Education, 330 U.S. 1, 16 (1947) 18

Healy v. James, 408 U.S. 169, 180 (1972) 17

Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 144-45 (1987) (Scalia, J., dissenting) ... 14, 16

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 247 (1948) 8

Katzenbach v. Morgan, 384 U.S. 641, 668 (Harlan, J., dissenting) 10

Lemon v. Kurtzman, 403 U.S. 602 (1971) 16, 19

Lynch v. Donnelly, 465 U.S. .668 (1984) 20

McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring) 7

Marsh v. Chambers, 463 U.S. 783 (1983) 12

Meyer v. Nebraska, 262 U.S. 390, 402 (1923) 22

NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 17

Texas Monthly, Inc. v. Bullock, 109 S.Ct. 890, 913 (1989) ... 14, 20

Thomas v. Review Board of Indiana Employment Security Division, 450 U.S. 707, 717-18 (1981) 17

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969) 11, 17

Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) 24

United States v. Seeger, 380 U.S. 163 (1965) 13, 24

Wallace v. Jaffree, 472 U.S. 38, 113 (Rehnquist, J., dissenting) 12, 21

Walz v. Tax Commission of New York City, 397 U.S. 664, 673 (1970) 12, 15

Welsh v. United States, 398 U.S. 333 (1970) 14, 24

Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) 10

Widmar v. Vincent, 454 U.S. 263 (1971) 3, 17, 19

Zorach v. Clauson, 343 U.S. 306 (1952) 12, 13, 16

OTHER FEDERAL CASES

Bender v. Williamsport Area School Dist., 741 F.2d 538, 549.18 (3d Cir. 1984), vacated on other grounds, 106 S.Ct. 1326 (1986) 6

Brandon v. Board of Education, 635 F.2d 971, 978 (2d Cir. 1980) 23

Mergens v. The Board of Education of the Westside Community Schools, 867 F.2d 1076, 1079 (8th Cir. 1989) 6, 19

Mergens v. The Board of Education of the Westside Community Schools, No. Cv 85-0-426, slip op. at 11, n.1 (1988) (Reproduced in Petition for a Writ of Certiortari: Appendix B) 9

CONSTITUTIONS AND STATUTES

The United States Constitution First & Fourteenth Amendments ..... Passim

The *Equal Access Act*, 20 U.S.C. §§ 4071-4074 (1984) ..... Passim

LEGISLATIVE HISTORY

Madison, Federalist No. 51 ..... 15, 27

Religious Speech Protection Act: Hearing on H.R. 4996 before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Cong., 2d Sess. 47 (1984) 11

S. Rep. No. 357, 98th Cong., 2d Sess. 8 (1984) 9

SECONDARY AUTHORITIES

Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," 1987 *Duke L.J.* 977, 984-85 27

Cord, R., *Separation of Church and State* (1982) 13

Corwin, "The Supreme Court as National School Board," 14 *Law & Contemp. Prob.* (1949) 13

Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 *Nw U.L. Rev.* 1 , 16 (1986); 9

Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 *Harv. L. Rev.* 933 (1989) 10

McConnell, "Accommodationism of Religion," 1985 *Supreme Ct. Rev.* 1, 14-23 ..... 12, 14

Malbin, M., *Religion and Politics, The Intentions of the Authors of the First Amendment* (1978) 13

Mill, J., *On Liberty* 129-31 (Library of Liberal Arts ed. 1956) 25

Mirsky, "Civil Religion and the Establishment Clause," 95 *Yale L.J.* 1237, 1255 (1986) 26

Note "The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools," 92 *Yale L. J.* 499, 507-09 (1983) 9

Note, "The Establishment Clause, Secondary Religious Effects, and Humanistic Education," 91 *Yale L.J.* 1196 (1982) 28

Strossen, "A Framework For Evaluating Equal Access Claims by Student Religious Groups: Is There a Window For Free Speech in the Wall Separating Church and State," 71 *Cornell L. Rev.* 143, 162 (1985) 9

JOINT APPENDIX

J.A., p. 488 ..... 4, 22

J.A., p. 73-77, 154-55, 185, 190 5

J.A., p. 75 5

J.A., p. 234 ..... 5, 22

J.A., p. 231 5

J.A., p. 479 6

J.A., p. 312 7

J.A., p. 211-212, 214-15 9

J.A., p. 73 10

J.A., p. 92, 111-12, 123-24, 247 11

J.A., p. 75, 131, 163 ..... 16, 22

J.A., p. 431-43, 451-54 17

J.A., p. 113 17

J.A., p. 341, 345-46 18

J.A., p. 489 22

INTEREST OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS*

As a law professor with children of my own in the Nebraska public schools system, I am concerned with preserving fundamental freedoms secured by the First Amendment as applied in the public schools. I have published in support of First Amendment issues in the past and feel compelled in this case because of the magnitude of the issues involved and the short shrift often given to free exercise over establishment concerns to argue in support of a more compassionate resolution of the issues herein involved.

* Counsel of record to all parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

SUMMARY OF ARGUMENT

Westside High School has deprived Bridget Mergens and her fellow members of the proposed Bible Study Fellowship Club of fundamental rights to free speech, free association, free exercise, equal protection, as well as the protection of the *Equal Access Act*. Westside officials in their brief rely on a "closed forum" characterization of the school's extracurricular activities in their effort to avoid recognition of the students' free speech rights and application of the *Equal Access Act*. The students in their brief on the merits have persuasively refuted Westside's forum characterization arguments. The proper resolution of this case, then, turns on the adequacy of the argument reconciling the First Amendment rights of the students with the establishment concerns that are really at the heart of the matter. This amicus curiae brief addresses the establishment issue in light of the other First Amendment rights implicated by the discriminatory exclusion of religious extracurricular activities from the public schools.

Briefly, no well-reasoned establishment argument justifies Westside's discriminatory treatment of the students' Bible Study and Fellowship Club. From a neutral principelist perspective, *Widmar v. Vincent*, 454 U.S. 263 (1971), is on point and controlling. The school's announced mission of "total education" of their students including development of "wholesome attitudes" and "good human relations" match the purposes of the Bible Study and Fellowship Club. Moreover, a curriculum nexus exists between bible study and related curriculum areas. Further, unrebutted trial testimony, supported by the legislative history of the *Equal Access Act* and common experience establishes that secondary school students are capable of distinguishing neutral treatment from endorsement of relig-

oriented extracurricular clubs. Any other conclusion would be untenable in any event, because students would also be incapable of distinguishing discriminatory exclusion from hostile disapproval.

From an accommodationist perspective, toleration of the Bible Club would alleviate significant governmental interference with the ability of religious students to define and carry out their religious views, rights protected by free exercise and free association, without sliding over into the preferential treatment the Establishment Clause historically was meant to exclude.

From a separationist perspective, equal recognition of religious extracurricular activities as per *Widmar* serves the secular purpose of encouraging student development and the free expression of ideas, has the secular effect of reinforcing diversity and state neutrality toward value orientation, and diminishes entanglement problems by decreasing the need for monitoring student groups lest religious ideas be smuggled in under other pretenses.

From a reconciliationist perspective, the balanced recognition of the students' free speech, free association, free exercise and equal protection rights avoids the establishment of the civil religion of Secular Humanism which jealously seeks protection from any competing belief systems that is not informed by epistemic rationality and science. Reconciliationism would require compassionate toleration of students whose compulsory attendance at public schools threaten their religious orientation.

Because establishment principles can be reconciled from any number of interpretivist paradigms with the First Amendment rights of the students, Westside's discriminatory exclusion of the Bible Study and Fellowship Club cannot be justified.

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ARGUMENT

PERMITTING EXTRACURRICULAR RELIGIOUS ACTIVITIES IN THE PUBLIC SCHOOLS RESPECTS THE FREE SPEECH, FREE EXERCISE, FREE ASSOCIATION AND EQUAL PROTECTION RIGHTS OF THE STUDENTS INVOLVED WITHOUT VIOLATING ESTABLISHMENT PRINCIPLES.

This important First Amendment case squarely presents the issue of whether the discriminatory treatment of religious speech and activities in an extracurricular setting in public schools can be justified by reliance on Establishment Clause principles.

The reconciliation of First Amendment rights with establishment concerns is one of the most difficult issues facing the Court today. In addressing this complex problem jurists and commentators have recommended various paradigms for understanding and resolving church and state conundrums. Usually the explanatory models focus on establishment concerns without giving free speech, free association, free exercise and equal protection rights adequate consideration. Consequently, the selected paradigms may obscure the complex interrelationship between the rights involved rather than enlighten; the paradigms on the other hand, may facilitate the rational resolution of an otherwise irresolvable conflict of legal principles. Of course no consensus view exists as to the appropriate paradigm that would capture the essence of church and state relations. Models are proposed, relied upon and discarded as their explanatory powers diminish under different factually settings. The dominant paradigms include neutral principelism, accommodationism, strict separationism, and reconciliationism. While controversy remains as to the cogency of the variant explanatory models, an examination of each applied to the facts of this case supports the Eighth Circuit's decision requiring that Westside High School provide equal access to the students' Bible Study and Fellowship Club. This brief is limited to a review of the competing church and state paradigms and their application to the facts of this case.

A. *NEUTRAL PRINCIPLEISM FAVORS THE EQUAL TREATMENT OF RELIGIOUS EXTRACURRICULAR CLUBS.*

The liberal principle of neutrality, a concept embodied in the time honored notion of equal protection, mandates that public benefits neither be granted nor withheld on the basis of race, creed or religion. In effect the neutrality principle invalidates all forms of unjustified state discrimination.

The facts of this case closely track those at issue in *Widmar v. Vincent*, 454 U.S. 263 (1981), a case that can be understood as an affirmation of the neutrality paradigm. Whether characterized as strictly a free speech case requiring content-neutral regulation of free speech or a free exercise case requiring neutrality toward religion, *Widmar* mandates, on First Amendment principles apart from public policy consideration supporting the *Equal Access Act*, that extracurricular religious activities be given neutral treatment in the context of education conducted under state auspices.

The pivotal issue in the case at bar is whether Westside officials, notwithstanding the First Amendment rights found implicated in *Widmar*, may discriminate against the students' Bible Study and Fellowship Club. Westside seeks to distinguish the otherwise controlling *Widmar* on two grounds: differences in forum characterization and the enhanced impressionability of secondary, as compared with university students. A neutral principles analysis would reject both distinctions. Discrimination based on the religious content of the extracurricular activity violates free speech, equal protection and free exercise whether the discrimination occurs at the university or the secondary school level; neutral accommodation of such activities, in comparison, does not violate establishment principles. The forum characterization and enhanced impressionability arguments

simply cannot justify the blatant discrimination involved in this case.

1. *Defects of The Curriculum-Related Argument*

In essence Petitioners argue that school administrators may discriminate against Respondent's Bible Study and Fellowship Club because public schools are nonpublic forums within which the administrators wield substantial discretionary authority. Petitioners argue that their discretionary authority follows from the fact that Westside High School, unlike a university, is a nonpublic forum because all of its activities, including extra-curricular programs, meet curriculum-related tests.

However, the curriculum-related claim neither captures the announced policies justifying extracurricular clubs, explains the admissions of Westside's administrators, nor reflects the actual state of affairs. School Board policy 5610 justifies a wide spectrum (beyond narrow curriculum contexts) for student clubs because such clubs serve as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." (Joint Appendix 488 [hereinafter J.A.]).

If the clubs were limited to expanding knowledge and skills development, then a curriculum nexus would at least correspond to the justificatory policy statement. Where the policy encompasses concepts of "total education" including views of "wholesome attitudes" and "good human relations," then the educational objectives have been broadened to include matters not covered by the curriculum directly. Indeed, the extra-curricular clubs might be best justified for their relation to the "total education" of the students beyond narrow curricular matters. Accordingly, it would be irrational to exclude for "beyond the scope of educational objectives" reasons the students' Bible Study and Fellowship Club which identifies these "total education" objectives as constituitive of its purposes as well. (J.A. 73-77, 154-155, 185, 190). Indeed, the reference to "Fellowship" in the name of the club itself reflects the organizer's intent that the members would meet, in part, to "talk about things that are going on in our lives and how we can help each other and give advice and give encouragement to one another." (J.A. 75). How could any rational review of the club's purposes deny their compatibility with the published School Board Policy 5610? It is not surprising then that under cross examination at trial Dr. Findley admitted that the objectives of the Bible and Fellowship club were supportive of the noncurricular goals and missions of the school in providing total education by promoting good citizenship, wholesome attitudes and good human relations. (J.A. 234).

This view expanding the scope of acceptable clubs beyond a curriculum nexus to include activities conducive to wholesome attitudes and good human relations explains why Dr. Findley, principal of Westside High School, expressly admitted at trial that at least one club "Peer Advocates," a service activity club allowing students to work with handicapped students, was recognized despite the absence of any nexus with the existing curriculum (J.A. 231). Providing services to the handicapped stimulates wholesome attitudes and develops good human relations.

Even without an expanded view of the mission of total education, the evaluative nature of the curriculum-related characterization, if afforded discretionary deference, would permit unfettered discrimination under the pretext or guise of bright-line curriculum tests. The Eighth Circuit recognized that deferring to the administrator's pretext of relying on a "curriculum-related" test would permit officials to circumvent the constitutional principle of equal access and the express policy underlying the *Equal Access Act* by administrative decree while

allowing them to arbitrarily deny unfavored student speech. (*Mergens v. The Board of Education of the Westside Community Schools*, 867 F.2d 1076, 1079 (8th Cir. 1989)).

The facts of the instant case in this regard make it clear that the students' Club was excluded not because of any lack of nexus to the educational objectives of Westside, but rather because of discriminatory purposes. If Westside administrators easily found a curriculum-related nexus between the Chess Club (math), the Subsurfer Club (physical education), and the service clubs Interact and Zonta (sociology), then why could they not see a connection between bible study and fellowshipping and the educational missions of teaching literature, poetry, sociology, history, moral philosophy and related curricular objectives?[1]

It is obvious that the Westside administrators did not exclude Respondent's Bible Study and Fellowship Club because of all the thirty other clubs, (J.A. 479), which applied for and were recognized by school officials it was the only group which neither developed wholesome attitudes and good human relations nor could be justified as having a curriculum-related nexus. Rather,

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[1] The Court in *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963) stated "It certainly may be said that Bible is worthy of study for its literary and historical qualities." 374 U.S. at 225. The Third Circuit in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 549.18 (3d. 1984), vacated on other grounds, 106 S.Ct. 1326 (1986) discounting a similar curriculum related justification for discriminating against religious activities during free activity periods stated:

> While it might be said that each of these activities enhances the curricular goals of the school by promoting civic awareness (the Key Club, logical thought (the Chess Club), practical applications of scientific principles (Aviation club), or a general sense of responsibility (Office Aides), the same extended chain of reasoning could be used to justify religion as a promoter of civic, social, and intellectual values.

the group was discriminated against because of its speech content: religion. If so, the discriminatory treatment would not even satisfy the *Cornelius* requirements for nonpublic forums that they be " 'reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.' " (*Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 800 (1985) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The closed-forum expanded discretionary-authority argument urged in distinguishing *Widmar's* neutral principelism is simply a nonpersuasive ruse calculated to obscure under the pretext of administrative discretion Westside's discriminatory treatment of the Bible Study and Fellowship Club.

Westside administrators discriminated against the students' Bible Study and Fellowship Club solely because of their misunderstanding of the requirements of the establishment clause: they concluded that notwithstanding the compatibility of the Bible Study and Fellowship Club with the total education and curricular objectives of the school and contrary to *Widmar*, that permitting a religious group to meet with school approval would be an encroachment upon their perception of constitutional requirements demarcating the wall of separation between church and state. (J.A. 312). However, "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." (*McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)). Stated differently, "it is common ground that nothing in the Establishment Clause requires the State to suppress a person's speech merely because the *content* of the speech is religious in character." (*Bender v. Williamsport Area School Dist.*, 106 S.Ct. 1326, 1337 (Burger, C.J., dissenting)). Justices Rehnquist and White joined in the dissent.

Moreover, we have been warned against constitutionalizing the wall of separation metaphor, a figure of speech, that easily captures the imaginations of administrators but inadequately describes the complexity of church and state relations.[2] Neutral principelism cannot abide the curriculum related ruse used to cover the blatant discrimination involved in this case. If the exclusion is to be justified, it must be establishment principles not pretexts of a curriculum-related distinction. Neutral principelism would hold equal access compatible with establishment principles and supportive of First Amendment rights.

2. *The Errors Inherent in the Endorsement Issue*

The second reason given by the Petitioners for discriminating against the students' Bible Study and Fellowship Club, notwithstanding consistency with educational objectives and the clear authority of *Widmar* to the contrary, focuses on the supposed enhanced impressionability of secondary school students. That is, the Establishment Clause requires that the state neither prefer nor discriminate on the basis of religious content. If the school recognized religious groups on par with other student groups then some impressionable secondary school students might mistakenly infer state support of religion contrary to the requirements of the Establishment Clause.

Westside's empirical assumption of implied endorsement is wrong factually and is self defeating conceptually. Judge Beam in his trial court's opinion credited the unrebutted testimony of Dr. David Moshman, qualified as an expert in the develop-

[2] Justice Reed, in dissent in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 247 (1948), the year following *Everson's* first invocation of the wall metaphor as an explanatory paradigm of church and state relations, in response to his perception that the wall metaphor was obscuring analysis, stated that "[a] rule of law should not be drawn from a figure of speech."

ment of cognitive reasoning and intellectual development, to the effect that "students over the age of 12 years can make sponsorship distinctions and that there is no significant differences between high school and college students in their abilities to understand endorsement or nonendorsement by the school." (*Mergens v. The Board of Education of the Westside Community Schools*, No. Cv 85-0-426, slip op. at 11, n.1 (1988) (Reproduced in Petition for a Writ of Certiorari: Appendix B)). Student testimony corroborated Dr. Moshman's opinion that students can distinguish school sponsorship from neutral recognition of a bible club. (J.A. 211-212, 214-15).

The unrebutted testimony that secondary school students are cognitively indistinguishable from university students with respect to their ability to make sponsorship distinctions finds support in the literature and is consistent with congressional findings connected with the passage of the *Equal Access Act*. The available studies indicate that adolescents resist authority and are capable of independent critical thought. (Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 *Nw U.L.Rev.* 1, 16 (1986); Note "The Constitutional Dimensions of Sudent Initiated Religious Activity in Public High Schools," 92 *Yale L. J.* 499, 507-09 (1983); Strossen, "A Framework For Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?," 71 *Cornell L. Rev.* 143, 162 (1985)). The Senatorial Committee considering extending *Widmar* to the secondary school level via the *Equal Access Act* observed that "[a]uthors writing in leading periodicals have considered the issue and agree that students below the college age can understand that an equal access policy is one of State neutrality toward religion; not one of State favoritism." (S. Rep. No. 357, 98th Cong., 2d Sess. 8 (1984)). The Eighth Circuit accepted "Congress' fact-finding" on this issue. In this regard it is well established that "[t]o the extent 'legislative fact' are [sic]

relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect." (*Katzenbach v. Morgan*, 384 U.S. 641, 668 (Harlan, J., dissenting)).

Apart from the fact finding regarding the apparent endorsement issue, if students cannot understand the neutral treatment afforded religion by an equal access policy, how can they be expected not to infer hostility toward religion if only religious extracurricular activities are excluded from the school? If they cannot distinguish neutral treatment from endorsement, how can they distinguish discriminatory treatment from hostility? Moreover, why should the entire burden of mistaken endorsement versus hostility to the bible study group be placed on the shoulder of the students? Why not allocate a heavy burden of persuasion to the state when First Amendment rights are being jeopardized because of the possibility of mistaken views regarding endorsement arising out of neutral treatment? For an extensive overview of the problems of burdens of proof in the free exercise context, (see Lupu, "Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion," 102 *Harv. L. Rev.* 933 (1989)). In this regard the Court should respect the time honored cliche: "The remedy for bad speech is more speech." (*Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

To this end the students urged the school, if necessary to avoid the impression of impermissible sponsorship, to make announcements in the school paper or the public address system to the effect that the school did not endorse or in any way sponsor the Bible Study and Fellowship Club. (J.A. 73). Similarly, Respondents preferred dispensing with the common appointment of a "faculty sponsor" who would perform sporadic custodial monitoring lest others falsely infer school endorsement because of the occasional attendance of a faculty

sponsor. (J.A. 92, 111-12, 123-24, 247). Accordingly, Westside's argument that Respondents are in reality seeking school endorsement of their Club and its religious tenets is nonsensical. Rather, what the students seek is a student initiated and conducted extracurricular activity devoid of any school sponsorship other than neutral permission to meet. Accordingly, notwithstanding the religious content of their speech,[3] the students are protected by the constitutional principle recognized in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), and reaffirmed in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), to the effect that students do not "shed their constitutional rights to freedom of speech or expression at the school house gate."

In summary, application of the neutral-principles paradigm for interpreting church and state issues would require that the students' Bible Study and Fellowship Club be afforded equal access. This conclusion is compatible with the *Equal Access Act*, as well as the constitutional principles of free speech, free association, free exercise and equal protection. The discriminatory treatment of the students' Bible Study and Fellowship Club can neither be justified on a pretest of a curriculum-related distinction, or on the pretense of implied endorsement. Neutral principleism requires equal access in line with *Widmar* and provides an analytical explanation why establishment principles are not adversely implicated.

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[3]Professor Lawrence Tribe made the point in congressional hearings considering the constitutionality of religious speech in the public school setting that "[n]o conceivable principle of distinction can suggest that students who have a right to wear arm bands to protest the war suddenly lose that right if they utter the name of God in the process, or if, heaven forbid, they should do it as a group instead of single file." Religious Speech Protection Act: Hearing on H.R. 4996 before the Subcommittee on Elementary, Secondary, and Vocational Education of the House Committee on Education and Labor, 98th Cong., 2nd Sess. 47 (1984).

B. *ACCOMMODATIONISM RECOMMENDS TOLERANCE OF RELIGIOUS EXTRACURRICULAR CLUBS AS A NON-PREFERENTIAL MEANS OF AVOIDING INTERFERENCE WITH THE RELIGIOUS NEEDS OF STUDENTS.*

Accommodationism is an interpretivist paradigm invoked in the First Amendment arena as an alternative to the strict separationism suggested by the wall metaphor. The paradigm willingly acknowledges the historical reality and the normative acceptability of the fact that "[o]ur system at the federal and state levels is presently honeycombed" with governmental support of religion. (*Engle v. Vitale*, 370 U.S. 421, 437 (1962) (Douglas, J., concurring)). The accommodationist paradigm has been variously justified on the basis of "original intent" analysis, (Justice Rehnquist recommended the replacement of *Lemon* with an "original intent accommodationist" scheme in *Wallace v. Jaffree*, 472 U.S. 38, 113 (Rehnquist, J., dissenting)), as a practical way of ameliorating the latent "dangers" of governmental hostility toward religion thus preserving free exercise, (*Walz v. Tax Commission of New York City*, 397 U.S. 664, 673 (1970)), and as keeping with the political theory of pluralism historically and presently underlying the Constitution. McConnell, "Accommodation of Religion," 1985 *Supreme Ct. Rev.* 1, 17.

The accommodationist question presented in this case is whether permitting non-discriminatory treatment of religious extracurricular activities can be justified in the same way the First Amendment permits legislative prayer, (*Marsh v. Chambers*, 463 U.S. 783 (1983)), released-time programs for religious training away from school premises, (*Zorach v. Clauson*, 343 U.S. 306 (1952)), religious exemptions from the (*Civil Rights Act of 1964, Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862 (1987)), or the preferred protection of religion that the

Free Exercise Clause itself entails. In short, is equal access part of the traditional honeycomb indicative of Framer's intent which is normatively worth preserving?

The "original intent" argument supporting accommodationism relies heavily on historical examples rebutting the historicity of strict separationism. (*See*, R. Cord, *Separation of Church and State* (1982); M. Malbin, *Religion and Politics, The Intentions of the Authors of the First Amendment* (1978); Corwin, "The Supreme Court as National School Board," 14 *Law & Contemp. Prob.* (1949)).

The public policy or expediency argument justifies an accommodationist approach in circumstances where strict separationism would entail significant governmental interference with the possibility of persons living in accordance with the the dictates of their religious consciousness. As the Court has repeatedly recognized

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our tradition. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

(*Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

Adopting an accommodationist perspective, the Court has validated, against establishment challenges and in keeping with free exercise rights, religious exemptions from specific state duties, such as military draft laws, (*United States v. Seeger*, 380

U.S. 163 (1965). *Welsh v. United States*, 398 U.S. 333 (1970)), or antidiscrimination provisions of civil rights legislation. (*Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862 (1987)). The Court in such cases has held that Accommodationism constitutionally alleviates "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (*Corporation of Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2870 (1987)). As Justice Scalia, dissenting in *Texas Monthly Inc. v. Bullock*, observed, "[i]t is not always easy to determine when accommodation slides over into promotion, and neutrality into favoritism," (109 S.Ct. 890, 913 (1989)), but the principle remains nonetheless: where strict separationism would likely interfere with the ability of religious adherents to carry out their religious responsibilities then the state "may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (*Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45 (1987) (Scalia, J., dissenting)).

Accommodationists have also argued that the historical political theory that underlies the Constitution is more consistent with an accommodationist than a separationist position. (McConnell, "Accommodationism of Religion," 1985 *Supreme Ct. Rev.* 1, 14-23). The argument essentially has three parts explaining the political theory of the Framers specifically and contemporary liberal theory generally. First, morality essential to public order is problematic within the liberal state because the state cannot justifiably be the source of ultimate values, but instead is limited to providing a regime of fair procedures for mediating self interest. In brief, there is a social need for public virtue but no legitimate way for the state to shape public morality. Second, the genius of pluralism is that private associations outside of government provide the principal means by which civic responsibility is developed and the possibility of public order made possible. These associations, including

families, churches, and other organic groups, "bear the brunt of the responsibility for articulating and inculcating values of morality and justice in the liberal republic." *Id.* at 17. Third, Madison's theory of factionalism[4] essential to the political theory underlying the Constitution explains how the liberal state benefits from the civic virtue flowing from private organizations, without suffering the dangers of religious tyranny that would result if the state compelled a unitary religious or moral perspective:

> Liberal political theory thus favored religion, but it did not favor any one religion. It guaranteed religious freedom in the hope and expectation that religious observance would flourish, and with it morality and self-restraint among the people. But it feared monopoly in religion, especially at the national level.

(McConnell, *supra* at 19-20).

Finally, there exists valid policy reasons for accommodating religion apart from any intent of the framers argument. That is, accommodationism "constitutes a reasonable and balanced attempt to guard against" the "latent dangers" of government hostility toward religion. (*Walz v. Tax Commission of New York City*, 397 U.S. 664, 673 (1970)). Unswerving adherence to strict separationism, rather than balanced accommodationism, would trivialize and unnecessarily privitize the religious experience of many devoted and patriotic citizens. Accommodating their religious sensitivities, without endorsing their belief system as that of the state's, would compassionately respect their twin allegiances to god and country.

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[4] Madison, in Federalist No. 51, expressly relied on the favorable circumstances for religious freedom that the multiplicity of religious sects had presented in colonial America as the exemplar for his recommending analogous factionalism in politics.

Supreme Court justices have, in many instances, adopted the accommodationist rationale as an alternative to strict separationism. Justice White, in dissent in *Lemon v. Kurtzman*, articulated an accommodationist approach as an acceptable alternative to a strict separationist solution:

> The Free Exercise Clause of the First Amendment at least permits government in some respects to modify and mold its secular programs out of express concern for free-exercise values.... "[W]hen the state encourages religious instruction ... it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs."

(403 U.S. 602, 664-65 (White, J., dissenting) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952)).

Again in *Corporation of Presiding Bishop v. Amos*, Justice White writing for the Court, in upholding a section of the Civil Rights Act of 1964 exempting religious groups from Title VII's antidiscrimination provisions, held that it is a permissible legislative purpose to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (107 S.Ct. 2862, 2870 (1987)). To the same effect, Justice Scalia, in dissent in *Hobbie v. Unemployment Appeals Commission*, observed that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." (480 U.S. 136, 144-45 (1987)).

Applied to the facts of the instant case, there are sound bases for accommodating religious extracurricular activities. Bible study and fellowshipping are a vital part of the daily lives of the students involved. (J.A. 75, 131, 163). Rather than a

private religion which can be fully realized by personal prayer in a closet far from the public eye, these students identify their very self worth by their willingness to share their religious views and fellowship. When they were denied the right to gather together for purposes of religious discussion and fellowship at the high school where they spent much of their day with many of their friends and associates, (J.A. 431-43, 451-454), they were put in the impossible position of choosing between adhering to their religious conscience or respecting the orders of the school administrators. Rather than "sneaking around behind the administration's back", (J.A. 113), and secretly meeting for religious fellowship and study during free time or before or after school, the students curtailed their rights of free speech, (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), *Widmar v. Vincent*, 454 U.S. 263, 269 (1981)), free exercise,[5] and free association[6] and petitioned the courts for constitutional relief.

Surely the concept of accommodation fits squarely when personal rights are so manifestly implicated. Clearly then the Court would follow the best of our tradition by respecting the religious nature of many students who are subject to compulsory school laws but retain a view of a life well lived which

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[5] The school, by excluding use of the school facilities for religious extracurricular activities when they are made available for other activities, has denied a public "benefit" because of conduct mandated by religious belief, contrary to *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-718 (1981),

[6] The Court observed in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) that "[while the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition." More recently, the Court in *Healy v. James*, 408 U.S. 169, 180 (1972), recognized that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."

intertwines religious with secular affairs. By accommodating the needs of students who view religion as a way of life rather than simply a contemplative experience that can be done privately in purely religious forums the state would throw off the callous indifference to religion an exclusionary policy would necessarily entail. In doing so the state would neither violate the original intent of the Framers regarding establishment, the political theory of pluralism which historically and normatively justifies establishment principles, nor perpetuate the latent dangers of governmental hostility toward religion.

C. *SEPARATIONISM IS NOT JEOPARDIZED WHERE EQUAL TREATMENT OF RELIGIOUS CLUBS SERVES SECULAR PURPOSES, HAS SECULAR EFFECTS AND DOES NOT ENTAIL ENTANGLEMENT.*

Separationism, as an interpretivist model, has substantially influenced the way church and state problems are perceived, especially by nonlawyers. Indeed the Westside school administrators in this case have justified their discriminatory treatment of the students' Bible Study and Fellowship Group on strict wall of separation reasoning. (J.A. 341, 345-46). The complexity of church and state relationships, however, cannot so easily be disposed.

The wall metaphor does not even explain the case, *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), which proposed it as the proper historical interpretation of the Framer's intent. For even as Justice Black explained that no tax in any amount could be used to support religious activities, the Court permitted, against establishment challenges, tax money to be used to reimburse parents for the cost of transporting their children to parochial schools: so much for the strict wall of separation. The religious needs of parents and children were accomodated as compatible with the secular purposes of education generally. The wall metaphor, if taken literally, would simply leave out of the analysis special considerations which public policy and free speech, free exercise, free association and equal protection principles require. A wall cannot constitutionally demarcate boundaries between church and state lest other personal rights be subordinated to a figure of speech.

Strict separationists since *Everson* have developed a three-part test, first announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as a canonical guide for analyzing establishment issues: the wall of separation is not violated if the incursion has a secular purpose, a secular effect and does not entail excessive entanglement. In brief, the permeable boundary between church and state must rationally accommodate competing rights and public interest analyses.

The Eighth Circuit applying a strict separationism analysis in this case held, (*Mergens v. The Board of Education of the Westside Community Schools*, 867 F.2d 1076, 1080 (8th Cir. 1989)), on the authority of *Widmar v. Vincent*, 454 U.S. 263 (1981), that an equal access policy does not violate *Lemon* and is required as a matter of constitutional principles apart from the applicability of the *Equal Access Act*. The Court in *Widmar* observed that an equal access policy has a secular purpose of encouraging student development and the free expression of ideas. Similarly the Court noted that any discriminatory policy would require increased monitoring of student groups lest religious ideas be smuggled in under other pretenses. Thus a restrictive policy would entail enhanced rather than diminished entanglement.

Widmar's holding that an equal access policy does not violate strict separationism is binding here unless it can be affirmatively shown that a nondiscriminatory policy at a secondary school level would have the *effect* of advancing religion due to the false impression of students who infer that the school is

endorsing the religious group. However, the empirical and conceptual error associated with the empirical endorsement argument has been rebutted previously in this brief in connection with the discussion of the neutral principles paradigm. Suffice it to say that the unrebutted testimony at trial, the congressional fact-finding supporting the *Equal Access Act*, the available sociological studies of the cognitive abilities of secondary students, and common sense all suggest that high school students are capable of understanding that an equal access policy reflects constitutionally required neutrality toward religion rather than sponsorship. Moreover, any other conclusion would raise the converse dilemma of the implied hostility a discriminatory policy would entail. Accordingly, an equal access policy would not even violate the strict separationist paradigm, as the Eighth Circuit observed in this case.

D. *RECONCILIATIONISM MANDATES THE RECONCILING OF STUDENTS' RIGHTS WITH ESTABLISHMENT PRINCIPLES SUCH THAT THE CIVIL RELIGION OF SECULAR HUMANISM IS NOT GIVEN AS A JUSTIFICATION FOR EXCLUDING RELIGIOUS EXTRACURRICULAR ACTIVITIES.*

Reconciliationism represents a principled alternative to strict separationism. The model, in embryonic stages of recognition, has received receptivity from justices disenchanted with the exclusivity, questionable historicity, impracticality and unacceptable normative implications of *Lemon's* strict separationism. For example, the court in *Lynch v. Donnelly*, 465 U.S. 668 (1984), in questioning the controlling effect of *Lemon's* tripart test, observed that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." (*Id.* at 679). More specifically, Justice Scalia, dissenting in *Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890, 913 (1989), recommended more of a reconciliationist model in explaining that "*Lemon* is not, after all, a statutory enactment."

Reconciliationism can initially be described in contrast to the other interpretivist models. First, it rejects strict separationism as giving undue weight to establishment over other personal rights such as free speech, free exercise, free association and equal protection principles. Second, it rejects the appearance of ad-hoc balancing accommodationism sometimes is accused of and seeks to rationalize a more principled solution to church and state conflicts. Third, reconciliationism questions the efficacy of neutral principelism as a mediating principle in church and state relationships, especially in its inability to accord free exercise principles respect beyond that which is required by free speech and equal protection.

Reconciliationism, then, represents an alternative to the strict separationist's constant depreciation of the free exercise rights of effected parties. If any free exercise claim is not to be held unconstitutional out of hand as a violation of strict separationism, then the court must recognize a principled way of respecting free exercise rights without abandoning establishment concerns. Although neutral treatment will go a long ways toward minimizing the adverse effect of discriminatory exclusion of religion from public affairs, in some instances it will not be enough. Religion in certain cases should be given a preferred status justified on free exercise reasoning. In the words of Justice Scalia, protecting free exercise even if it means giving religious activities a preferred status may in certain instances be viewed as legitimate "secular purpose and effect." (*Wallace v. Jaffree*, 109 S. Ct. 890, 913 (1989) (Scalia, J., dissenting)).

Applied to the issues in this case the focus of the discussion by the parties has been whether impressionable students are likely to infer endorsement from an equal access policy; free exercise and privacy rights implicated by a discriminatory policy are largely overlooked or, if discussed at all, they are attached to a free speech argument. Preoccupation with

the issue of "secular effect" stemming from *Lemon* creates a blind spot for the free exercise and privacy rights of school children and their families who are subject to compulsory school laws but retain nonetheless their fundamental rights to religious and moral autonomy. That is, the Court has long recognized that in our liberal society the state has no jurisdictional competence over the formulation of the ultimate values and morality of the children educated under state auspices. Rather, it is within the family that children are expected to receive their earliest identity, their sense of self worth, their most intimate set of values, beliefs and aspirations. The basic rights of the family to moral and religious autonomy enjoys constitutional priority in the public school setting over the "desire of the legislature [state] to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters." (*Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)).

Under the facts of this case, fellowship, bible reading, worship and prayer are a vital part of the daily lives of the students who initiated the Bible Study and Fellowship Club. (J.A. 75, 131, 163). These activities constitute part of their view of a life well lived. School policy justifying extracurricular clubs generally, explain that student clubs are a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." (Westside School Board Policy 5610, reproduced in J.A. 488). Similarly, school policy encourages diversity in the approach of the clubs in recognition that the"primary liberties in a student's life involve the process of inquiry and learning, of acquiring and imparting knowledge, and of exchanging ideas." (Westside School Policy 5450, reproduced in J.A. 489). Moreover, Dr. Findley admitted at the trial that Bible study and fellowship would likely "develop good citizenship," "develop wholesome attitudes," "good human relations," and "knowledge and skills." (J.A. 234). By excluding the dissemination of

any religious ideas or activities in voluntary club activities, Westside has discriminated against the free speech, free exercise, and free association rights of the students who have their own ideas as to wholesome attitudes, good human relations and the processes of inquiry, learning and exchange of ideas, as discussed previously in the neutral principles and accommodationist models.

The argument justifying discriminatory exclusion of voluntary extracurricular religious activities relies heavily on the postulated responsibility of the public schools to inculcate homogeneous "wholesome attitudes" rather than opening up the exchange of ideas to include any religious perspective. The Second Circuit Court of Appeals adopted the view that public schools should inculcate public virtue in justification of the discriminatory treatment of religious activities received in *Brandon v. Board of Education*, 635 F.2d 971, 978 (2d Cir. 1980):

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit. (*Id.* at 978).

This notion that the public schools have a special responsibility to preach public values, which is jeopardized by religious extracurricular activities, is at odds with *Meyer* and prompts several questions. First, from whence come the special role of the public schools in value inculcation? Second, what are these values? Third, how is the exclusivity of these values justified against establishment challenges? Fourth, what happened to the long-recognized right of the family and the individual right of privacy which precludes state intervention into the domain

of value development? Fifth, if the state, through its schools decides to promote a belief system that is the functional equivalent of religion, has it not established its own form of religion? Sixth, if religious ideas are peculiarly excluded by the public schools as possible value sources, have they not expressed hostility to religion and established their own version of a preferred non-religious belief system?

Some urge the adoption of a civil religion justified as serving the sociological role of traditional religions in building a sense of community and responsibility without invoking the problematic aura of sacredness. A few advocates of civil religion would even embue civil religion with sacred implications. The unanswered question remains as to why inculcating such a preferred belief system in the public schools does not constitute an impermissible establishment of religion?

In defining religion for constitutional purposes, the Court has long since abandoned a narrow theistic definition stating that "among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (*Torcaso v. Watkins*, 367 U.S. 488, 495 n.11 (1961) (invalidating a Maryland oath of office requirement of a profession of belief in God)). In the conscientious objector cases the court has adopted a functional test for characterizing beliefs as religious for constitutional purposes. The test is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God ...." (*United States v. Seeger*, 380 U.S. 163, 165-66 (1965)). Only if beliefs are insincere or do not "rest at all upon moral, ethical, or religious principle but instead rest solely upon considerations of policy, pragmatism, or expediency" (*Welsh v. United States*, 398 U.S. 333, 342-43 (1970)), should they be classified as nonreligious for purposes of First Amendment protection.

The fact that parallel belief systems premised alternatively on "moral, ethical, or religious principles" qualify as religious for First Amendment purposes poses special problems if public schools believe that they have a special mission of value inculcation which extracurricular religious activities would challenge. John Stuart Mill in his famous essay *On Liberty* warned against state-run schools inculcating *the* accepted values through state education:

> All that has been said of the importance of individuality of character, and diversity of opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education. A general [s]tate education is a mere contrivance for molding people to be exactly like one another; and as the dominant power in the government ... it establishes despotism over the mind. ... There would be nothing to hinder them from being taught religion, if their parents chose, at the same schools where they were taught other things. All attempts by the [s]tate to bias the conclusions of its citizens on disputed subjects are evil .... (J. Mill, *On Liberty* 129-31 (Library of Liberal Arts ed. 1956)).

Moreover, if public schools have a unique role in transmitting basic values to our youth, what about free exercise as a central value worthy of respect? By Westside allowing the Christian Bible study group to meet on an equal basis to other student groups and by explaining to the students that the school permits such equal treatment out of respect for free exercise, would not the school thereby further its duty of value inculcation without establishing despotism over the mind?

Ultimately the argument for permitting the state to inculcate nonreligious values in an exclusive way rests upon the

legitimacy of civil religion. Yehudah Mirsky, in this regard argues that "a self-conscious and critically reflective civil religion can play a positive role in cementing the communal symbolic life of American society." (Mirsky, "Civil Religion and the Establishment Clause," 95 *Yale L.J.* 1237, 1255 (1986)). He suggests that civil religion be adopted as a societal response to the advent of modernity and the loss of the social glue previously supplied by traditional religion:

> By developing and nurturing civil religions the members of modern societies attempt to recapture some of the lost, organic solidarity of pre-modern societies by linking political ideas and institutions, naturally shared by all, with a network of hallowed meanings. By so doing, a society can link its political ideas and institutions to its basic, heartfelt sentiments and aspirations. (*Id.* at 1250).

But while civil religion foisted upon public school children in the nonreligious values inculcated in them as part of their public education may provide social glue otherwise lacking in modernity, the exclusive perpetuation of such a parallel belief system runs counter to the principle of establishment. Is civil religion not subject to establishment prohibitions because of expediency or because we deem it to be true as a matter of constitutional morality?[7] Does not the Establishment Clause necessarily relegate the responsibility for inculcating belief systems to individuals, families, religious and other private associa-

[7] The Court in *Abington School Dist. v. Schempp*, 374 U.S. 203, 225 (1963), has long acknowledged the fact that "the state may not establish a 'religion of secularism' in the sense of affirmatively opposing thus 'preferring those who believe in no religion over those who do believe.' "

tions? Is not that the message of Madison's notion of factionalism as a practical limit to the state's authoritarianism?[8]

Some would defend the values of Secular Humanism exclusively inculcated through the public schools on the basis of their supposed neutrality. They are neutral because they satisfy the tests of epistimic rationality and scientific method. What strict separationists are unable to see is that for the religious adherent of sacred writings and spiritual insight through nonrational means, science and epistimic rationality are neither the sole source nor the best means for understanding truth. Thus lip service paid by liberals to the notion of freedom of conscience can be translated to tolerance subject to their own special conditions of epistemic rationality.

Professor Carter, considering this very problem questions:

> [W]hy is it that contemporary liberalism, which proclaims the freedom of individual conscience, values conscience less when an individual chooses to discover the world through faith rather than reason? What is it about religious belief that liberalism fears? (Carter, "Evolutionism, Creationism, and Treating Religion as a Hobby," 1987 *Duke L.J.* 977, 984-85).

Carter recommends that the state "not insist on reason as the only path to knowledge about the world," (Id. at 995), and suggests that we find "ways to take seriously the deep religious feelings that motivate so many Americans in their daily lives." (*Id.*)

[8] Madison, in Federalist No. 51, expressly relied on the favorable circumstances for religious freedom that the multiplicity of religious sects had presented in colonial America as the exemplar for his recommending analogous factionalism in politics translated to tolerance subject to their own special conditions of epistemic rationality.

Applied to the issue of equal access in this case, reconciliationism requires that the free exercise rights of the students be taken seriously. Extracurricular fora serve the secular purposes of enhancing the free flow of ideas and stimulating the moral development of those involved. An equal access policy would take seriously the deep religious feelings of many students. It would make the secular curriculum less threatening and less coercive to those compelled to attend but who may follow a different belief system than that which the public school system seeks to inculcate. That is, the availability of a forum for voluntary group prayer, fellowship and bible study would go a long ways toward taking the secular sting out of compulsory education laws without jeopardizing the state's exclusive commitment to science and epistimic rationality in the regular curriculum.

The ultimate question is whether the public education's commitment to Secular Humanism,[9] premised on science and epistimic rationality is to be given not only a preferred curricular status because of its supposed neutrality, but an exclusive and authoritarian approbation as constitutive of a life well lived for modern man. Does the Establishment Clause prohibit the establishment of all but civil religion?

Under reconciliationism, the free exercise rights of the students involved would be reconciled with establishment concerns. Rather than giving exclusive weight to the wall of separation metaphor, the rights of religious students in the public education setting would be considered. Why should students, protected in the capacity of other civil liberties as explained in

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[9]For a discussion of the phenomenon of secular humanism as part of the core curriculum of public education, with establishment implications, see Note, "The Establishment Clause, Secondary Religious Effects, and Humanistic Education," 91 *Yale L.J.* 1196 (1982).

Tinker, be required to shed their free speech, free association, free exercise and equal protection rights at the school house gate if their autonomy is exercised in favor of religious beliefs? Why should the state be allowed to inculcate the values of Secular Humanism without facing competition from other religious views in the context of voluntarily formed extracurricular groups? Why should rights of association, free speech and free exercise be curtailed because of their religious content when establishment principles well considered are not even jeopardized?

CONCLUSION

Westside's discriminatory exclusion of the students' Bible Study and Fellowship Club challenges the civil liberties of students generally and furthers no policy other than a misguided view of establishment restrictions. Although interpretivist views of establishment vary, none properly considered would justify the exclusionary treatment of religious clubs that admittedly satisfy the announced purposes of clubs generally. Westside excluded the Bible Study and Fellowship club because of its religious orientation. To uphold the discriminatory treatment would be tantamount to establishing Secular Humanism as the official creed of the state over which the public schools would serve as the primary pulpits for indoctrination and dissemination of ideas. Such a result would portend the realization of John Stuart Mill's fears that state education might be elevated as the means for establishing despotism over the minds of the youth.

For the reasons stated, the judgment of the Eighth Circuit should be affirmed, and the judgment entered for Respondents.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, *et al.*,
Petitioners

v.

BRIDGET C. MERGENS, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR TARA LYNN BURR, ET AL., AND RICHARD GARNETT, ET AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amici will address only the following question, arising under the Equal Access Act, 20 U.S.C. §§ 4071-4074:

Whether public school officials may prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other student groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	6
ARGUMENT	8
THE EQUAL ACCESS ACT PROTECTS THE RIGHT OF A VOLUNTARY, STUDENT-INITIATED RELIGIOUS GROUP TO MEET ON SCHOOL GROUNDS ON THE SAME TERMS AS OTHER STUDENT GROUPS	8
A. The Protections Of The Equal Access Act Are Triggered By "One Or More" Noncurricular Groups, Without Regard To The School Board's Intent	9
B. "Noncurriculum Related Groups" Are Those Student-Initiated Groups That Have No Direct Relation To Courses Offered At The School	13
1. Petitioners' proposed "local definition" of "curriculum" would render the Equal Access Act meaningless	13
2. The congressional understanding of the term "curriculum related" is limited to activities closely tied to actual course-work	16
3. One or more of the student-initiated activities at Westside was noncurriculum related	19
C. None Of The Supposed "Pedagogical" Reasons Asserted By Petitioners Justifies Content-Based Discrimination In Violation Of The Act	22

TABLE OF CONTENTS—Continued

	Page
1. School officials may not deny a fair opportunity to meet on the ground that the speech involved is likely to be "controversial" or insufficiently "balanced"	22
2. School officials may not deny a fair opportunity to meet on the ground that all student groups must have faculty "sponsors"	24
3. School officials may not deny a fair opportunity to meet on the ground that it is necessary to avoid the appearance of endorsement	25
CONCLUSION	30

TABLE OF AUTHORITIES

Cases: Page

Abington School Dist. v. *Schempp*, 374 U.S. 203 (1963) 22
American Textile Mfrs. Inst. v. *Donovan*, 452 U.S. 490 (1981) 15
Bender v. *Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated*, 475 U.S. 534 (1986) 21
Board of Education v. *Burr*, No. 11097/88 (filed Nov. 15, 1988) 1, 20, 21
City of Lakewood v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138 (1988) 22
County of Allegheny v. *American Civil Liberties Union*, 109 S. Ct. 3086 (1989) 27, 28
Garnett v. *Renton School District*, 675 F. Supp. 1268 (W.D. Wash. 1987), aff'd, 874 F.2d 608 (9th Cir. 1989), petition for cert. pending, No. 89-641 1, 15, 20
Hazelwood School Dist. v. *Kuhlmeier*, 108 S. Ct. 562 (1988) 28
Healy v. *James*, 408 U.S. 169 (1972) 4
Honig v. *Doe*, 108 S. Ct. 592 (1988) 12
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 12-13
Lynch v. *Donnelly*, 465 U.S. 668 (1984) 27
Niemotko v. *Maryland*, 340 U.S. 268 (1951) 22
Perry Education Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 12
Saia v. *New York*, 334 U.S. 558 (1948) 22
Schneider v. *New Jersey*, 308 U.S. 147 (1939) 4
United States v. *Euge*, 444 U.S. 707 (1980) 15
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 27
Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 27
Walz v. *Tax Commission*, 397 U.S. 664 (1970) 29
Widmar v. *Vincent*, 454 U.S. 263 (1981) 4, 9, 26

Constitutional and Statutory Provisions:

U.S. Constitution, Amendment I 3, 7, 12, 21
Equal Access Act, 20 U.S.C. §§ 4071-4074 *passim*

TABLE OF AUTHORITIES—Continued

Legislative History: Page

130 Cong. Rec. p. H3868 (daily ed. May 15, 1984) .. 11
130 Cong. Rec. (daily ed. June 27, 1984)
p. S8335 ..... 17, 18
p. S8337 18
p. S8341 ..... 9, 10, 15
p. S8342 ..... 11, 16, 18
p. S8354 18
p. S8358 18
p. S8359 ..... 17, 18
p. S8360 18
p. S8361 ..... 17, 18
p. S8362 15
p. S8364 ..... 17, 18
p. S8365 18
p. S8366 17
p. S8367 18
p. S8368 ..... 17, 18
130 Cong. Rec. (daily ed. July 25, 1984)
p. H7726 18
p. H7727 18
p. H7730 18
p. H7732 ..... 16, 18, 19
p. H7734 17
p. H7735 ..... 18, 19
p. H7737 ..... 17, 18
p. H7834 19
Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 26
Hearings on the Equal Access Act: Hearings on H.R. 2732 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 98th Cong., 1st Sess. (1983) 25
H.R. Rep. No. 710, 98th Cong., 2d Sess. (1984) 9, 14, 27

TABLE OF AUTHORITIES—Continued

Page

Religious Speech Protection Act: Hearings on H.R. 4996 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, 98th Cong., 2d Sess. (1984) 11, 25
S. Rep. No. 357, 98th Cong., 2d Sess. (1984) 4, 7, 9, 13, 24, 26-27, 28

Miscellaneous:

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 36 (1986) 12
Random House Dictionary of the English Language (2d ed. 1987) 17
Stone, *Content Regulation and the First Amendment*, 25 Wm. & Mary L. Rev. 189 (1983) 23
Webster's Third International Dictionary (1986) .. 17

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INTEREST OF AMICI CURIAE

Amici are public high school students in Buffalo, New York, and Renton, Washington, who—like respondents in this case—are involved in litigation with their school districts because they requested permission to meet together voluntarily in an empty classroom outside of school hours to study the Bible, discuss religious and moral issues, and pray. The *Burr* case is presently in the discovery phase in the Supreme Court for the State of New York, *Board of Education* v. *Burr*, No. 11097/88 (filed Nov. 15, 1988). The *Garnett* plaintiffs have recently filed a petition for a writ of certiorari (No. 89-641) to review the judgment of the Ninth Circuit in their case. *Garnett* v. *Renton School District*, 874 F.2d 608 (1989).

The purpose of this brief is to urge the Court, in deciding this case, to lay down principles for the application of the Equal Access Act that will guide students and school administrators across the nation who are embroiled in controversy over voluntary, student-initiated religious discussions on high school campuses.

The United States has consented in writing to the filing of this brief. A copy of that consent letter is being filed with this brief. All other parties filed a blanket consent letter on July 15, 1989, authorizing any party to file a brief as *amicus curiae*.

STATEMENT OF THE CASE

Westside High School is a typical public high school, with the typical range of extracurricular activities organized by and for students. These include some activities organized and controlled by the school—sports teams, the National Honor Society, the band, and others. These also include activities organized and led by students, with only minimal supervision by the faculty "sponsor." These include social and service clubs, chess club, drama club, and others. At Westside High School, like many other high schools in other parts of the country, a small group of students requested to meet in empty classrooms before or after school, on equal terms with other student groups, to discuss matters they consider central to their lives both at school and elsewhere. The response of the Westside High School officials was, unfortunately, also typical. They deemed the subject matter of the students' speech—religion—inappropriate to the forum of a public school, and denied the students' request to meet.

This case presents each of the factual elements necessary to state a claim under the Equal Access Act, 20 U.S.C. §§ 4071-4074. Respondents asked to form a club "identical in its formation, rights, privileges, terms and conditions" to the 30 student clubs already existing at Westside High School, except without a faculty sponsor. J.A. 59 (Pretrial Uncontroverted Facts ¶ 13). The proposed group is voluntary, student-initiated, student-run, and open to any student who wants to join. J.A. 73-74, 76, 112, 119, 133-34, 144, 154, 155, 164-65, 189, 211. Students at Westside are permitted to initiate organizations and to meet on the premises of the school for a wide variety of purposes. J.A. 240-41, 291, 479-487 (list of student groups). Indeed, organizations are initiated more often by students than by faculty. J.A. 358. Many of these student-initiated, student-run organizations have no direct relation to courses offered at the school. J.A. 124, 143, 148-49, 193, 220-22, 225-26, 227-28, 229-30, 231, 232-33, 368-69. School officials refused Bridget Mergens and her group permission to meet on the basis of the content of their proposed speech. J.A. 246, 340-341, 349, 364.

Since these facts are established on the record, all that remains is a question of law—whether the court of appeals applied the correct legal standard under the Equal Access Act and the First Amendment to the facts just stated. Nonetheless, it is necessary to correct three factual misimpressions that may have been created by petitioners and their supporting *amici*, and that obscure the legal issues.

1. It is not true that respondents have been free to meet as a group on school grounds, "informally" or otherwise. See Pet. Br. 6, 13, 82. The record shows that the staggered schedule of classes at Westside High School precluded any group larger than four or five students from gathering together at any time other than before or after school; respondents' group had 20 to 25 members. J.A. 77, 112-113. To hold a meeting on a regular basis before or after school requires the permission of school administrators. J.A. 432-33, 452, 453-54. The principal testified that he would not allow any group, even a checkers club, to meet regularly without official sponsorship. J.A. 453. Since that permission was withheld (J.A. 246, 317-19, 454), it was impossible for the group to meet at Westside High School, at least without "sneaking around be-

hind the administration's back" (J.A. 113).[1] Allowing snippets of conversation in the hallways or at lunchtime is no substitute for a regular meeting. As Bridget Mergens testified, "There would have been no way that all the kids could have gotten together at the same time. Mostly any conversation about any religious matters was one on one or two on two or about four or five kids at the most." J.A. 112-113. The students in this case are no more free to meet than were the students in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), or *Healy* v. *James*, 408 U.S. 169 (1972).[2]

2. The second, and related, point that must be corrected is petitioners' insistence (Pet. Br. 7, 31, 83-84) that respondents sought official endorsement of their proposed club. The students unequivocally stated precisely the opposite. For example, Bridget Mergens described her request to the principal, Dr. Findley, in these words:

> I simply wanted to be able to start a group, just not even start an official group, but just have a group of kids that were allowed to meet in the school, on the—on the campus in noninstructional time and be

[1] The Equal Access Act was intended to remedy situations like that in Sonoma, California, in which a school board voted to prohibit students from meeting for religious speech but also told the students that they could continue to meet "underground" despite the prohibition. S. Rep. No. 357, 98th Cong., 2d Sess. 13 (1984).

[2] Nor was the principal's suggestion that the students meet at a nearby church with which school officials have "a good relationship" (J.A. 285, 81-83; Pet. Br. 8) an acceptable alternative. The students want to discuss how their beliefs relate to their experiences at school (see, *e.g.*, J.A. 75); thus to meet in that setting is an important element of their speech. Moreover, respondents sought to form a nondenominational group, an intention inconsistent with meeting in or under the auspices of a particular church. It is highly inappropriate for school officials to play any role in endorsing, let alone choosing, a particular church as an appropriate meeting place. In any event, the existence of an alternative, even if appropriate, is legally irrelevant to their right to meet in this forum. *Healy* v. *James*, 408 U.S. 169, 183 (1972); *Schneider* v. *New Jersey*, 308 U.S. 147, 103 (1939).

> able to get together with Christian friends and just have fellowship.

J.A. 80-81. Michelle Harris, another member, stated:

> I would like us to be recognized whether we're endorsed or not. They don't necessarily have to say that they agree with the people but to allow them to be able to meet, I would like to see that.

J.A. 156. Indeed, the students were willing to have the school post an official disclaimer of endorsement, if that is what it took to meet. J.A. 72-73, 156.[3] Students with little or no interest in the religious discussion group testified that they would perceive no school endorsement if the club were formed on the same terms as other clubs. J.A. 211-212, 214-215.

The only evidence of respondents' desire for official endorsement cited by petitioners or their supporting *amici* is the request for official "recognition" (see J.A. 244). But since the school administrators refused to allow "unrecognized" student groups to meet on a regular basis in empty classrooms before or after school, this request was no more than a request to meet. It is the school —not the students—that insists upon tying endorsement to equal access.

The School Board evidently has an exaggerated notion of the value that teenagers place on their endorsement and approval. Respondents, like *amici*, do not care about the school's endorsement. As the record shows, all they seek is an equal opportunity to meet.

3. Contrary to petitioners' claim (Pet. Br. 87-88), the record shows that other student clubs are allowed to meet without the active participation or control of faculty sponsors. Many sponsors leave the conduct of club meet-

[3] Some of the students believed they should be given the same privilege as other student groups to use the school bulletin boards, newspaper, or P.A. system to publicize their meetings (J.A. 119, 132-133, 141, 155); but other members would find it "acceptable" if they could simply meet without obtaining access to these media (J.A. 104-105; see also *id.* at 155, 156).

ings to students (J.A. 93, 192), and either do not attend at all (*e.g.*, J.A. 92-93) or, at most, stand by to take attendance and ensure discipline or safety (J.A. 119, 124, 167). The degree of involvement is left to the "discretion . . . of the club sponsor" (J.A. 260). To allow respondents to meet alone, or with a faculty member serving only as a nonparticipating monitor, would *not* "radically restructure the forum," as petitioners contend (Pet. Br. 54). The structure already varies from club to club according to the nature of the activity. J.A. 260.

INTRODUCTION AND SUMMARY OF ARGUMENT

High school is a time of intellectual, social, and spiritual awakening, when students begin to question the norms that govern life around them and to develop for themselves the habits of mind and spirit that will guide them for the rest of their lives. High school students begin to understand themselves as part of a wider community, with ties and responsibilities to friends, nation, and world. Thus, at Westside, like other high schools, we see students wanting to form social and service clubs and pursuing idealistic and unconventional objectives. Moreover, young people use the experience of fellowship and interaction with others to explore and test new ideas and convictions. This is particularly important for students—like respondents and these *amici*—whose point of view is out of the mainstream and often the butt of ridicule or hostility. For them, the opportunity to gather together and share their ideas with fellow students is an indispensable support for their individual consciences against the pressures of the secular environment in which they find themselves.

Most high schools in the United States today recognize the importance of voluntary, student-initiated activities, and make it possible for students to meet in empty classrooms before or after school, and sometimes during the day in unstructured extracurricular activity periods. But some schools, like Westside, have selectively restricted this access when the subject the students wish to discuss

is their religion. The reasons are many. Some school officials entertain the common, but mistaken, belief that religion must be "kept out of the schools" in all circumstances on account of the Establishment Clause. Petitioners' brief shows that Westside school officials share this assumption. Pet. Br. 81-88. Some school officials refuse student requests to meet because of the threat of lawsuits from well-financed organizations that oppose the concept of equal access. Some respond to community pressure from those who think that high school students who wish to study and discuss the Bible must be intolerant, bigoted, and closed-minded. We suspect this is what petitioners must mean when they state that the proposed religious discussion group is "unreflective of the community values [the school board] espouses" (Pet. Br. 84). Whatever the reason or combination of reasons, high school officials in many communities have shut the door to students on the basis of the religious content of their speech. See S. Rep. No. 357, 98th Cong., 2d Sess. 6 (1984).

Controversies over voluntary, student-initiated religious discussion groups have perplexed and harried school administrators, even as these officials have frustrated and censored the speech of the students. There is a grave need, on both sides, for clear and authoritative legal guidance. Petitioners have chosen to argue this case in a highly fact-specific manner, as if *certiorari* had been granted to review the Eighth Circuit's approach to consideration of assertedly factual questions (*e.g.*, Pet. Br. 25-26, 43, 91). *Amici* submit this brief to emphasize the issues of law common to this and other cases under the Equal Access Act.

The existence of a "limited open forum" depends upon objective facts, to be evaluated in light of congressional standards, and not on the stated intentions or educational philosophy of the school board. Under the Equal Access Act, the prohibition on content-based discrimination (20 U.S.C. § 4071(a)) is triggered whenever a

federally-funded public school allows meetings by "one or more noncurriculum related student groups" (*id.*, § 4071 (b)). By "curriculum" Congress meant the actual courses offered by the school; any definition based on the general "mission and goals" of the school would render the Act meaningless.

Having allowed one or more noncurriculum related student groups to meet, the school board is not free to deny permission to another group on the basis of the content of its speech. It may not deny permission to meet on the ground that the group's speech is likely to be "controversial" or not likely to be "balanced." It may not deny permission to meet on the ground that the group's speech would make an active faculty sponsor inappropriate; the Act requires, instead, that the board confine faculty involvement to a neutral monitoring function. And it may not deny permission to meet on the ground that allowing a meeting would connote "endorsement" or the appearance of endorsement. That theory directly contradicts the fundamental premises of the Equal Access Act: that nonpreferential access to meeting space does *not* connote endorsement, that high school students are capable of distinguishing between permission and endorsement, and that content-based exclusion is more likely to be reasonably perceived as hostility than equal access is to be reasonably perceived as endorsement.

ARGUMENT

THE EQUAL ACCESS ACT PROTECTS THE RIGHT OF A VOLUNTARY, STUDENT-INITIATED RELIGIOUS GROUP TO MEET ON SCHOOL GROUNDS ON THE SAME TERMS AS OTHER STUDENT GROUPS.

Congress passed the Equal Access Act in 1984 in response to widespread reports that public high school officials (often under threat of litigation) were discriminating against student groups who wished to meet on campus for religious discussions. After extensive investigation of equal access controversies and of the perceptions and ma-

turity level of high school students, as well as reflective consideration of the constitutional issues, Congress concluded that a clear, objective remedy is needed to enforce the free speech rights of high school students, similar to the rights already recognized by this Court in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), at the university level. See S. Rep. No. 357, 98th Cong., 2d Sess. (1984); H.R. Rep. No. 710, 98th Cong., 2d Sess. (1984).

That remedy was the Equal Access Act, 20 U.S.C. §§ 4071-4074. Under the Act, any federally-funded public high school "which has a limited open forum" is prohibited from denying "equal access or a fair opportunity" to any students "who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content" of their speech. *Id.*, § 4071(a). There is no question in this case that Westside school officials denied permission to respondent Bridget Mergens and her group to meet on the basis of the content of their proposed speech. The only legal issue is whether the extracurricular clubs and organizations allowed by the school triggered application of the Act.

A. The Protections Of The Equal Access Act Are Triggered By "One Or More" Noncurricular Groups, Without Regard To The School Board's Intent

The congressional sponsors deliberately drafted the Act to have a clear, objective scope of application, "triggered by what a school does, not by what it says." 130 Cong. Rec. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy, explaining reasons for final modifications in the definition of "limited open forum").[4] The Act's prohibition on content-based discrimination applies whenever a school allows "one or more noncurriculum related student groups to meet on school premises during noninstructional time" (20 U.S.C. § 4071(b)). The term "meeting"

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[4] All the citations to the Congressional Record in this brief will be to the daily edition, since no final edition was produced for this period.

is statutorily defined to include student group activities that are "not directly related to the school curriculum" (*id.*, § 4072(3)). The question, then, is whether any *one* of the student-initiated groups at Westside is not "directly related to the school curriculum."

Application of the Act does *not* depend, as petitioners contend, on whether the school board exercises control over which groups can meet (Pet. Br. 40), on whether the school allows " 'indiscriminate use' of its facilities by student organizations" (Pet. Br. 41), on the school board's "intent to permit unrestricted speech" (Pet. Br. 42, 43), or on whether the school board's supposed "educational justification[s]" for suppressing speech are "pretextual" (Pet. Br. 44).[5] It depends entirely on "what a school does"—namely, whether it allows "one or more" noncurricular groups to meet. If it does, then the Act applies. The school board's intentions are wholly irrelevant.

Petitioners contend, remarkably, that Congress's definition of a limited open forum ("one or more noncurriculum related student groups") is "obscure," and should be disregarded in favor of more congenial language from constitutional cases. Pet. Br. 60 n.24. But Congress chose the "careful wording" of this definition for the express purpose of preventing school boards from circumventing the Act by making an "official decision" not to have a limited open forum and to retain control of student groups "on a case-by-case basis." 130 Cong. Rec. S8341 (June 27, 1984) (Sen. Leahy). Petitioners are asking this Court to sanction precisely the policy that the sponsors of the Act sought to forbid.

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[5] These various standards are proposed by petitioners in the section of their brief entitled "WHS's School Activities Program Is Not A Limited Public Forum" (Pet. Br. 38). Since petitioners contend that the statutory standard under the Equal Access Act is the same as the constitutional standard (Pet. Br. 59-60 n.24), these standards must apply in their eyes to the Act as well as to the Constitution.

An early version of the Act, H.R. 4996, would have been triggered if a school allowed "non-school sponsored" groups to meet. In hearings, Representative Goodling (one of three main sponsors of the Act in the House) voiced concern that such language would unacceptably limit the intended scope of the Act. As a former school administrator, high school principal, and teacher,[6] he recognized that some school administrators (like petitioners here) were prone to consider any student activity given permission to meet as "school-sponsored," contrary to the intent of the legislation. *Religious Speech Protection Act: Hearings on H.R. 4996 before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor*, 98th Cong., 2d Sess. 14-15 (1984). In response, Representative Bonker emphasized that the opportunity for students to initiate groups is the key to determining whether the prohibition on content-based discrimination is triggered. *Id.* See also *id.* at 52 (testimony of Prof. Laurence Tribe) ("nonschool-sponsored" should be interpreted to include "student-initiated" groups); 130 Cong. Rec. S8342 (June 27, 1984) (statement of Sen. Hatfield) (initiation of groups by the students is the "triggering mechanism" of the Act). If a school allows students to initiate their own groups, as opposed to permitting only school-initiated, faculty-directed groups, then it has a "limited open forum" and may not discriminate on the basis of the religious, political, philosophical, or other content of the student groups' proposed speech. As already noted and as petitioners concede,[7] the student clubs at Westside often are initiated by the students.

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[6] 130 Cong. Rec. H3868 (May 15, 1984) (statement of Rep. Goodling) ("I have been a superintendent for 7 years, I have been a high school principal for 10 years, and so any legislation that comes before the Committee on Education and Labor, I want to make very, very sure that as a matter of fact it helps local school districts, it does not hinder local school districts.")

[7] See Statement of the Case, *supra*, at 3, for supporting citations to the record, and Pet. Br. 44 for petitioners' concession.

Petitioners' only argument for disregarding the statutory "one or more" groups language, other than to call it "obscure," is that the statutory term "limited public [sic] forum" is a "term of art," taken from this Court's constitutional cases, and should be interpreted in the same way. Pet. Br. 59-60 n.24. Petitioners seem not to have noticed that the statute uses a *different* term: "limited *open* forum." Their argument thus rests upon a *misquotation* of the statute.

Contrary to petitioners' claim, the Equal Access Act uses a broader, more objective test for a "limited open forum" than the courts have adopted in the constitutional context. While this Court has held that under the First Amendment, "selective access does not transform government property into a public forum," *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983), the Equal Access Act provides that the grant of access to a *single* noncurriculum related group creates a "limited open forum."[8] This is entirely appropriate. Congress, unlike the courts, is a democratically-elected body with authority to regulate the activities of institutions receiving federal funds. It does not share the courts' proper jurisprudential reluctance to overturn the decisions of locally elected school boards; it can adopt clearer, more sweeping remedies for what it perceives as a persistent practice of violating the constitutional rights of high school students. Cf. *Honig* v. *Doe*, 108 S. Ct. 592, 596-97 (1988) (enforcing congressional protections for the educational rights of handicapped children); *Katzenbach* v.

[8] See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. L. Rev. 1, 36 (1986) (the statutory definition "resembles the constitutional concept of 'limited public forum,' but it goes well beyond the Supreme Court's cases"). Notwithstanding the difference in standards, we agree with the court of appeals that petitioners' actions in this case violated respondents' constitutional rights. But since any violation of the Free Speech Clause in this context would be a violation of the Equal Access Act as well, there is no need for this Court to reach the constitutional question.

Morgan, 384 U.S. 641 (1966) (enforcing congressional protections for voting rights). Furthermore, a major impetus for the Act was to end any possible uncertainty on the part of school administrators and students as to the legal status of students' extracurricular speech, particularly religious speech. See S. Rep. No. 357, *supra*, at 11-14. Therefore, Congress took the practical step of substituting a clear and objective standard. Petitioners' attempt to return to the subjective standard of the constitutional cases should be rejected.

B. "Noncurriculum Related Groups" Are Those Student-Initiated Groups That Have No Direct Relation To Courses Offered At The School

A "limited open forum" exists under the Act only if one or more of the groups allowed to meet is "noncurriculum related" (20 U.S.C. § 4071(b)). While the term is not expressly defined by the statute, we would suggest several criteria for such a definition: (1) the definition should be based on Congress's understanding of the term; (2) the definition should be based on the ordinary meaning of the term in the English language; and (3) the definition should be designed to achieve, not to frustrate, the purposes of the Act. Petitioners' proposed definition fails in all three respects: it ignores explanations by congressional sponsors, it flies in the face of ordinary English usage, and it is so subjective and self-referential that it would, as the court below held (Pet. App. A12), render the Act "meaningless."

1. *Petitioners' proposed "local definition" of "curriculum" would render the Equal Access Act meaningless*

Petitioners contend that the Act must be interpreted "to allow local school officials to employ a local definition of curriculum, subject only to judicial review to insure against abuse" (Pet. Br. 63). In particular, petitioners reject the notion that "curriculum" refers narrowly to

the actual courses offered by the school and claim instead that it encompasses anything that contributes to the school board's "missions and goals" (Pet. Br. 30). Since their "missions and goals" are entirely self-defined, this amounts to an assertion that "curriculum" means whatever the school officials say it means.

This is borne out in actual application. Petitioner James Findley, principal of Westside, testified that he considered the curriculum to include "all the activities and clubs." J.A. 220. The following exchange occurred on cross-examination:

> Q. So just the very fact that it's a club at Westside High School makes it curriculum, in your opinion, is that correct?
>
> A. The fact that it's a club grows out of mission and goals for us, and what I believe parents expect or would think appropriate to offer, yes.

Id. Principal Findley went on to note that "a lot of activities are provided for young people to become involved and feel good about themselves"; that "kids who are really successful in school are also heavily involved in activities"; and "[s]o to just be in an activity itself, we have always felt it is important to the curriculum of Westside High School." J.A. 221. Under this standard, any group the school allows to meet is by definition "curriculum related" and the Equal Access Act would never apply.

Petitioners' definition would make the Equal Access Act meaningless. The Act rested on the premise that school authorities could not be fully trusted to treat student speech even-handedly. See, *e.g.*, S. Rep. No. 357, *supra*, at 11 ("many school districts are permitting extracurricular nonreligious speech but discriminating against extracurricular religious speech"); accord H. Rep. No. 710, *supra*, at 3, 6. Obviously, a school district that wishes to perpetuate its content-based discrimination can continue to do so if it has the power to decide for itself

whether it is subject to the Act. Because of this concern, members of Congress intended the Act to "speak[] with clarity about what a limited open forum means." 130 Cong. Rec. S8341 (June 27, 1984) (Sen. Leahy); accord *id.* at S8362 (Sen. Dole). Of course, school officials have the power to determine the contours of their curriculum—what courses to offer. Congress, however, legislated with respect to student *clubs*, and the policy embodied in the statute must be given effect. *American Textile Mfrs. Inst.* v. *Donovan*, 452 U.S. 490, 513 (1981) (citations omitted) (in construing a statute, the Court "should not 'impute to Congress a purpose to paralyze with one hand what it sought to promote with the other' "); *United States* v. *Euge*, 444 U.S. 707, 715 (1980) (citation omitted) (Court should refuse to construe statute "in a manner that would 'stultify enforcement of federal law' ").

As petitioners indicate (Pet. Br. 68-69), their self-referential definition of "curriculum related" was accepted by the Ninth Circuit in *Garnett* v. *Renton School District*, 874 F.2d 608, 614 (9th Cir. 1989), *petition for certiorari pending*, No. 89-641, which accordingly rejected *amici* students' equal access claims on facts virtually indistinguishable from these.[9] The difference in result between this case and *Garnett* underscores the im-

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[9] The school official's standard for "curriculum relatedness" in *Garnett*, quoted and approved by the district court and affirmed by the court of appeals, was as follows:

> The public high school curriculum, for that matter the curriculum of a school district, is the educational program which consists of all of those programs, whether they be academic or nonacademic, which give effect to the mission of the school district as decided by the local board of directors.
>
> * * * *
>
> Beyond that then, the curriculum is what the local school board says it is.

Garnett v. *Renton School District*, 675 F. Supp. 1268, 1271 (W.D. Wash. 1987), aff'd, 874 F.2d 608 (9th Cir. 1989) (quoting Baumgartner Dep. at 6, 8).

portance of a clear, objective legal standard. When school boards are permitted to use their own "local definitions," they can ensure that the Act will not apply; where an objective definition is used, the congressional purpose of preventing content-based speech discrimination is achieved.

2. *The congressional understanding of the term "curriculum related" is limited to activities closely tied to actual coursework*

As both sponsors and opponents of the Equal Access Act acknowledged, the definition of "noncurriculum related" student groups must be "fairly broad." See 130 Cong. Rec. S8342 (June 27, 1984) (Sens. Hatfield and Gorton). It follows that the antonym, "curriculum related," must be narrowly construed. For a group to be "curriculum related" there must be a close connection between the activity and actual coursework. This requirement is reflected in the statutory language itself. The Act defines a "meeting" as activities that are "not *directly* related to the school curriculum" (20 U.S.C. § 4072(3) (emphasis added)).

Representative Goodling addressed the definition of "noncurriculum related" in a colloquy on the floor of the House. Central to his definition was the question: "does the school or a schoolteacher require or directly encourage student participation in such group in connection with curriculum course work?" If so, then the "equal access policy would not be triggered." 130 Cong. Rec. H7732 (July 25, 1984). Senator Hatfield, the chief Senate sponsor, made much the same point when he explained that "curriculum related" activities are those that are an "extension of the classroom." 130 Cong. Rec. S8342 (June 27, 1984). These statements show that Congress used the word "curriculum" in accordance with its ordinary usage and meaning—actual courses—rather than in the specialized sense it is given by some educational theorists.[10]

[10] An expert witness on curriculum, Dr. Ward Sybouts, testified about the different interpretations of "curriculum" in educational theory and stated that Congress used the term as "consisting of courses that are offered by the school." J.A. 408. He stated that under the "broad theory" employed by many educational theorists and advocated by petitioners here, "just about anything could come under the school program or curriculum" (J.A. 417), including a Bible study club (J.A. 418).

Random House Dictionary defines "curriculum" as "the aggregate of courses of study given in a school,"[11] and *Webster's Third International* gives as the first definition: "the whole body of courses offered by an educational institution."[12] Contrary to petitioners' interpretation, the Equal Access Act is triggered whenever a school allows students to initiate clubs or activities that are not either "required" or "directly encouraged" in connection with classes offered at the school. A loose connection to the school's "goals" or "mission" is not sufficient.

The legislative history contains numerous examples of groups that would typically trigger the prohibition on content-based discrimination. The most commonly invoked example was a chess club.[13] Senator Hatfield said he could not "readily conceive of a criterion that could be used at this time to establish [chess club] as a curriculum-related activity," though he admitted with irony—and

[11] *Random House Dictionary of the English Language* 492 (2d ed. 1987).

[12] *Webster's Third International Dictionary* 557 (1986) (first definition). *Webster's* gives as its third definition something akin to petitioners' definition: "all planned school activities including besides courses of study organized play, athletics, dramatics, clubs, and home-room program." *Id.* Under this definition, clubs are part of the curriculum; the phrase "noncurriculum related clubs" would be a contradiction in terms.

[13] See 130 Cong. Rec. S8335 (June 27, 1984) (statement of Sen. Denton); *id.* at S8359 (statement of Sen. Biden); *id.* (statement of Sen. Nickles); *id.* at S8361 (statement of Sen. Jepsen); *id.* at S8364 (statement of Sen. Thurmond); *id.* at S8366 (statement of Sen. Grassley); *id.* at S8368 (statement of Sen. Evans); 130 Cong. Rec. H7734 (July 25, 1984) (statement of Rep. Smith); *id.* at H7737 (statement of Rep. Emerson).

foresight—that "as long as you have lawyers, they can find ways of doing things one way or another." 130 Cong. Rec. S8342 (June 27, 1984); *cf.* Pet. Br. 64-65 (denying that Senator Hatfield's statement about a chess club is "unequivocal"); *id.* at 75-76 (arguing that the chess club is "curriculum related" because it "contribute[s] to academic performance"). Other examples of noncurricular activities given by legislators included service clubs,[14] political activities,[15] philosophy,[16] music,[17] photography,[18] ethics,[19] business clubs,[20] sports clubs,[21] Key Club,[22] drama club,[23] math club,[24] stamp club,[25] debate,[26] groups fundraising for charities,[27] aerobics,[28] private social organizations,[29] Hi-Y,[30] and card club.[31] While *amici* do not contend that each of these groups would necessarily always be noncurriculum related, they demonstrate the breadth of the definition Congress had in mind and decisively refute petitioners' suggestion that any and all activities in the school are part of the curriculum. A number of the groups at Westside were among those specifically mentioned in the legislative history: a chess club, service clubs, a sports club (Subsurfers), private social clubs (Interact and Zonta), an equivalent to the Key Club, a math club, and a business club (Future Business Leaders of America).

[14] *Id.* at S8359 (Sen. Nickles) (June 27, 1984); *id.* at H7735 (July 25, 1984) (Rep. Bonker).

[15] *Id.* at S8335 (June 27, 1984) (statement of Sen. Denton); *id.* at S8337 (statement of Sen. Hatfield).

[16] *Id.* at S8335 (Sen. Denton); *id.* at S8337 (Sen. Hatfield); *id.* at S8358 (Sen. Biden); *id.* at S8364 (Sen. Thurmond).

[17] *Id.* at S8337 (Sen. Hatfield).

[18] *Id.* at S8337 (Sen. Hatfield); *id.* at S8365 (Sen. Baucus); *id.* at H7730 (July 25, 1984) (Rep. Clinger).

[19] *Id.* at S8354 (June 27, 1984) (Sen. Levin).

[20] *Id.* at S8358 (Sen. Biden).

[21] *Id.* at S8359 (Sen. Biden); *id.* at H7737 (July 25, 1984) (Rep. Emerson).

[22] *Id.* at S8359 (June 27, 1984) (Sen. Nickles); *id.* at H7735 (July 25, 1984) (Rep. Bonker).

[23] *Id.* at S8360 (June 27, 1984) (Sen. Mattingly); *id.* at S8364 (Sen. Thurmond).

[24] *Id.* at S8360 (Sen. Mattingly).

[25] *Id.* at S8361 (Sen. Jepsen); *id.* at S8367 (Sen. Gorton).

[26] *Id.* at S8368 (Sen. Evans); *id.* at H7732 (July 25, 1984) (Rep. Lloyd).

[27] *Id.* at H7726 (Rep. Roukema).

[28] *Id.* at H7727 (Rep. Roukema).

[29] *Id.* at H7732 (Rep. Goodling).

[30] *Id.* at H7735 (Rep. Bonker).

[31] *Id.* at H7834 (Rep. Siljander).

3. *One or more of the student-initiated activities at Westside was noncurriculum related*

School administrators in this case were not able to show that participation in most of the student activities at Westside was required or directly encouraged in connection with course work. They testified that participation in the extracurricular activities of the band, choir, and orchestra was required in connection with those courses. J.A. 219, 224-225, 228-229, 303. However, testimony by both school administrators and student participants showed that participation in chess club, Interact, Zonta, computer club, Future Business Leaders of America, drama club, international club, peer advocates, Junior Classical League, math club, and Subsurfers, among other activities, did not affect the grade or academic credit one received in any specific course. J.A. 124, 148-49, 193, 220-22, 225-26, 227-28, 229-30, 231, 232-33, 368-69. Petitioners offered no evidence that teachers "directly encouraged" participation in any of these clubs in connection with actual classes—and for many of the clubs such "direct encouragement" is highly improbable. All peti-

tioners can say in their brief is that "WHS actively encourages participation in its entire student activities program" (Pet. Br. 72); but this falls far short of a showing that each and every club was "directly encouraged" in connection with "curriculum course work."

Many of the clubs at Westside have only the most tenuous relation to curriculum course work. Petitioners maintain, for example, that the chess club is "related" to math and science classes because it "contribute[s] to academic performance" in math courses (Br. 75) and "enhances students' ability to engage in critical thought processes" (*id.* at 18-19). And petitioners claim that Zonta and Interact, community service groups affiliated with Rotary Clubs, relate to social studies classes because they "promote[] effective citizenship" and because students have occasionally received extra credit for particular service projects (*id.* at 19-20). Petitioners also attempt to tie the chess and service clubs to certain broadly defined "goals" of the WHS curriculum, such as "train[ing] good citizens" (Pet. Br. 77), "enhanc[ing] . . . critical thought processes" (*id.* at 18-19), and nurturing "life-long commitments to community service," rather than leaving this "to the happenstance of private conscience" (*id.* at 76-77).[32]

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[32] School districts in other parts of the country have shown comparable ingenuity in concocting connections between student-initiated activities and the curriculum. In *Garnett*, for example, during the pendency of the controversy the chess club was renamed the "Advanced Strategy and Tactics Club," apparently in order to make it appear more "curriculum-related." Dep. of D. Allen, at 5, 13-14 (Exc. 226). In *Burr*, the Buffalo, New York, school district has taken the position that every one of the 277 student clubs on the district's 1987-88 roster is "curriculum related," including such clubs as "Dungeons and Dragons." "Dungeons and Dragons" is justified on the following theory:

> [T]he club may properly be characterized as an 'intellectual games club' because the types of games that are played involve critical thinking, analysis, planning and advanced strategy. Simple games which may be utilized to "pass the time" are not a part of this club. The club draws on the above course concentrations [mathematics and logic, social studies, science fiction, mythology, and science] to enhance these thinking skills. Additionally, Dungeons and Dragons members develop organizational skills such as material arrangements, score keeping, and won/loss totals.

School Board's Answers to Defendants' First Set of Interrogatories, at 84-85 (Sept. 1989), in *Board of Education* v. *Burr*, No. 11097/88 (Sup. Ct., N.Y., filed Nov. 15, 1988).

It is difficult to conceive of a student club that could not fit within such an elastic definition of "curriculum." For example, participation in a political-party club (which petitioners seem to concede would be "noncurriculum related" (Pet. Br. 91)) would doubtless "provid[e] an understanding and appreciation of government processes"—the justification that petitioners offer for labeling participation in student government "curriculum related" (*id.* at 17)—and "contribute[] to academic performance" in political science classes by enhancing a student's awareness of political issues and current events.[33]

Indeed, on cross-examination, petitioner school officials admitted that respondents' proposed Bible study club would itself satisfy their test for curriculum-relatedness. They testified that the Bible club could "relate" to courses in English literature, history, sociology, or psychology

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[33] Significantly, petitioners appear to concede that the roster of student clubs in the *Bender* case constituted an "open forum" (Pet. Br. 43 n.18), but the clubs in *Bender* are virtually the same as the clubs here. See *Bender* v. *Williamsport Area School Dist.*, 741 F.2d 538, 543-544 n.8 (3d Cir. 1984), vacated on standing grounds, 475 U.S. 534 (1986). In *Bender* there were about 30 student groups, including Student Government, Key Club (a Kiwanis-sponsored community service club analogous to Interact), Business English Club, Future Homemakers of America, Vocational and Technical Club, Speech and Drama Club, and (at one time) Chess Club. The Third Circuit held in *Bender* that the student activity period constituted a limited open forum (*id.* at 549), even though it rendered judgment in favor of the school board on Establishment Clause grounds. Petitioners' definition of "curriculum related" evidently is so "local" (Pet. Br. 63) that only they can tell when it applies.

(J.A. 228, 235, 320) [34] and could contribute to the school district's goals of developing "good citizenship," "wholesome attitudes," "good human relations," and "social skills" (J.A. 234, 256, 306, 320, 366). This confirms that petitioners' "definition" amounts to pure standardless discretion. Cf. *City of Lakewood* v. *Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2143 (1988) (condemning "unbridled discretion in the hands of a government official or agency" over free speech); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948).

C. None Of The Supposed "Pedagogical" Reasons Asserted By Petitioners Justifies Content-Based Discrimination In Violation Of The Act

Petitioners have asserted several "legitimate pedagogical reasons" (Pet. Br. 50) for refusing to allow the students to meet. Each of these reasons is in direct conflict with the Equal Access Act. Indeed, petitioners' invocation of these "pedagogical reasons" indicates that the school officials in this case are fundamentally hostile to the very premises of free speech and neutrality toward religion that inspired the Act.

1. *School officials may not deny a fair opportunity to meet on the ground that the speech involved is likely to be "controversial" or unsufficiently "balanced"*

Under the Equal Access Act, a federally funded public high school that allows one or more noncurriculum related student groups to meet is forbidden to "deny equal access or a fair opportunity to, or discriminate against,

[34] There is little doubt that a close familiarity with the Bible could "contribute[] to academic performance" in any of these disciplines. As this Court has recognized, "[I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities." *Abington School Dist.* v. *Schempp*, 374 U.S. 203, 225 (1963).

any students who wish to conduct a meeting . . . on the basis of the religious, political, philosophical, or other content of the speech at such meetings" (20 U.S.C. § 4071 (a)). Petitioners claim that respondents' meetings would violate a supposed school rule that student clubs must "present controversial subjects in a balanced way" (Pet. Br. 46).[35] Administration of that rule requires school officials to decide what subjects are "controversial" and what range of opinions constitutes "balance." That is content-based discrimination of a most fundamental and pernicious sort, and is prohibited by the Act.[36]

[35] It is open to serious question whether petitioners really have any consistent policy of seeking "balanced discussion." For example, sociology students were required to attend a presentation by Planned Parenthood concerning birth control methods (*e.g.*, J.A. 95-96)—surely a controversial subject—yet there is no indication that an opponent of birth control was invited to respond. Likewise, although local businessmen addressed the Future Business Leaders of America Club (J.A. 354), it is fair to assume that neither the faculty sponsor nor a rebuttal speaker presented club members with questions about the legitimacy of the free enterprise system. In fact, the testimony shows that, far from maintaining Olympian detachment, Westside teachers regularly expressed in class their personal convictions, and that the students understood them as such. J.A. 126-127.

At other school districts that have taken the same legal position as that espoused by petitioners here, student organizations such as Students Against Drunk Driving, the environment club, and the Minority Student Union were allowed to meet without any requirement that their speech be "balanced."

[36] We do not necessarily claim that the Westside school officials are engaged in *viewpoint* discrimination; thus their protestations that their actions are not motivated by "hostility to religious viewpoints" (Pet. Br. 53) are beside the point. See also Pet. Br. 53-54 n.22 (denying that petitioners engage in viewpoint discrimination). The Equal Access Act specifically prohibits discrimination on the basis of the "content of the speech at such meetings," which includes subject-matter as well as viewpoint-based discrimination. On the distinctions between content-based, subject-matter, and viewpoint-based discrimination, see Stone, *Content Regulation and the First Amendment*, 25 Wm. & M. L. Rev. 189, 197-200, 239-242 (1983).

Whether a particular subject will be viewed as "controversial" depends heavily on the opinions of the decisionmaker. For example, principal Findley testified that "advocating a particular sexual preference" is "very controversial" but that protesting aid to the contras, nuclear energy, or nuclear war is not. J.A. 283-84. Petitioners betray their own biases when they compare Bridget Mergens and her friends to the Ku Klux Klan or the Black Panthers (Pet. Br. 53), accuse them (falsely) of "fronting for adults committed to a program of indoctrination" (*id.*),[37] and state that their activities are "unreflective of the community values [the school] espouses" (*id.* at 84).

To allow schools to bar "controversial" speech or to insist that all speech be conducted in a "balanced" fashion would effectively repeal the Equal Access Act. The very purpose of the Act is to allow students to discuss issues of religious, political, and philosophical import—subjects that are inherently "controversial." The Senate Report states that the prohibition of content-based discrimination was intended to preclude circumvention by school officials who might claim, as petitioners have here, that they were denying permission to meet not because of the religious content of a student meeting but "to avoid controversy." R. Rep. No. 357, *supra*, at 39.

2. *School officials may not deny a fair opportunity to meet on the ground that all student groups must have faculty "sponsors"*

Every student group at Westside must have a faculty "sponsor." On successive pages of their brief, petitioners claim that assignment of a sponsor would impermissibly "encourage the activities of a religious student club" (Pet. Br. 54), and that sponsors are "a burden many, if

[37] This insinuation is contradicted by the record, which shows that the students formed the group on their own initiative, without any instigation or involvement of pastor, parent or other adult (J.A. 74, 119-120).

not most, clubs would be happy to discard" (Pet. Br. 55). Whichever it is—benefit or burden—Congress anticipated this problem and solved it without any difficulty. Under the Act, schools are free to decide whether or not to assign faculty or other "sponsors," but "employees or agents of the school or government" may be "present at religious meetings only in a nonparticipatory capacity" (20 U.S.C. § 4071(c)(3)). The legislative history confirms that a school may not avoid compliance with the Act on account of a requirement of faculty sponsors. See *Hearings on the Equal Access Act: Hearings on H.R. 2732 before the Subcomm. on Elementary, Secondary, and Vocational Education of the Comm. on Education and Labor*, 98th Cong., 1st Sess. 11 (1983) (statement of Rep. Goodling); *Hearings on H.R. 4996*, *supra*, at 85 (statement of Rep. Bartlett). Consistent with the Act, respondents in this case have stated that they are "willing to oblige whatever the school policy was." J.A. 85; see also J.A. 118-19, 144, 165, 454 (Pretrial Uncontroverted Facts ¶ 15).

There is no basis for petitioners' claim that this would "radically restructure the forum" (Pet. Br. 54). As documented in our Statement of the Case (at pages 5-6), other clubs at Westside also have nonparticipating sponsors. But even if no other club had a nonparticipating sponsor, that would not preclude assigning a nonparticipating sponsor for the religious discussion group.

3. *School officials may not deny a fair opportunity to meet on the ground that it is necessary to avoid the appearance of endorsement*

Petitioners also assert that to allow respondents to meet would create "the appearance of political or religious partisanship" (Pet. Br. 51; see *id.* at 12). Indeed, petitioners opine that the students' request to meet "is nothing less than a request for the School to incorporate religious activities into its official program, and thereby to have school officials endorse participation in the religious club" (*id.* at 84). This is the crux of disagreement in all equal

access cases. We believe (and our entire constitutional tradition holds) that to *allow* free speech is not the same thing as to *endorse* it. Much is done and said on high school grounds, by students, teachers, and others, that the school does not (and would not) endorse. See, *e.g.*, J.A. 264-66, 327 (student newspaper publishes criticism of the school administration and other "controversial" material); J.A. 273 (participants in student government are permitted to engage in "heavy political discussions"). It cannot be otherwise. A high school student from Sonoma, California, put the point this way:

> They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities. The same should hold for religious groups.

Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 64 (1983) (testimony of Sarah Scanlon).

Respondents do not seek preference, but only equal treatment. They do not wish to impose their views on others, but only to engage in discussions among themselves and with those who choose to join them. School officials need have no fear under these circumstances that they will appear to have endorsed the content of the students' speech. Endorsement is not implied by a policy of equal treatment.

In *Widmar*, this Court concluded that granting a religious group equal access to a broadly available university forum does not "confer any imprimatur of state approval on religious sects or practices." 454 U.S. at 274. The Equal Access Act rests on a similar congressional finding, rendered after detailed investigation, that high school students are sufficiently mature to distinguish a school's tolerance of private religious speech from endorsement of the speech. The Senate Report concluded

that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led religious speech on the other." S. Rep. No. 357, *supra*, at 35; accord H.R. Rep. No. 710, *supra*, at 4. This "exercise of [congressional] fact-finding powers" (S. Rep. No. 357, at 9) was based in part on the testimony of many witnesses, including high school students, and in part on the expert views of psychologists. Congress's findings of legislative fact are "entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (citing cases).

Petitioners eventually appear to concede (Br. 91) that under most circumstances, a school does not "endorse" a religious club merely by permitting it to meet like other clubs. But they insist that this case is an exception because of the unique "structure" of Westside's "official student activities program" (Br. 87, 82). Indeed, they go so far as to assert that *anything* that goes on in the Westside student activities program "*is* government speech." *Id.* at 87 (emphasis in original).

These dramatic pronouncements notwithstanding, petitioners have not shown any way in which the existence of the club will actually "'convey a message that religion or a particular religious belief is *favored* or *preferred*,'" *County of Allegheny* v. *American Civil Liberties Union*, 109 S. Ct. 3086, 3101 (1989) (emphasis in original) (quoting *Wallace* v. *Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)), or that "'adherence to a religion [is] relevant in any way to a person's standing in the [school] community,'" *County of Allegheny*, 109 S. Ct. at 3101 (quoting *Lynch* v. *Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)). To the contrary, the trial testimony shows without exception that Westside students—including

those who did not attend the Bible study club—would not perceive the existence of the club as a school endorsement of religion. J.A. 211-212, 214-215, 136-137.

Indeed, the expert witness in this case testified that students would perceive official *hostility* to religion from the exclusion of the club in these circumstances (J.A. 396-397). Dr. Tangdall, the Assistant Superintendent, likewise apparently feared that the students might so construe the school's decision (J.A. 318). The Senate committee considering the Equal Access Act determined such perceptions to be both "reasonable" and widely held by students. S. Rep. No. 357, at 1, 19-20. It stands to reason that treating religion as inappropriate to the forum is more likely to be perceived as hostility toward religion than a policy of equal access and nondiscrimination is to be perceived as favoritism.

If there is any potential for perceived endorsement in the formation of a student Bible group at Westside, it is entirely the product of petitioners' intransigence. The record shows that petitioners have determinedly sought to foreclose every alternative save for complete prohibition of the Bible study club. Petitioners refuse to let the students meet regularly without "official" recognition, although the students would forego such formality if they were guaranteed a regular meeting place. J.A. 451-453, 80-81. Petitioners refuse the "less oppressive alternative" of disclaiming endorsement of the group, even though this alternative is readily available and acceptable to the students (J.A. 429-430, 72-73). See *Hazelwood School Dist.* v. *Kuhlmeier*, 108 S. Ct. 562, 579 (1988) (Brennan, J., dissenting); *County of Allegheny*, 109 S. Ct. at 3115. Most importantly, petitioners insist that with permission to meet *must* come all the trappings—a fully participating faculty sponsor, rights of access to the media, a booth at the Club Fair.

The Court should cut through this nonsense. The Equal Access Act guarantees respondents the right to meet, overseen by a nonparticipating monitor, and this

right alone plainly creates no appearance of endorsement. If the Court finds that the students are demanding other "rights"—such as access to school media—and that these create problems under the Establishment Clause, then those demands should be judged independently on their merits.[38] But the fundamental statutory right to a "fair opportunity . . . to conduct a meeting" on school grounds (20 U.S.C. § 4071(a)) must be upheld.

In *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970), this Court advocated "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." The Equal Access Act is a carefully-considered measure by Congress to further that ideal in the context of student-initiated activities in public high schools. Examination of the hearing reports, committee reports, and floor debates shows that the Act was designed for precisely a case such as this. Petitioners ask this Court to eviscerate the Act by allowing its applicability to be determined by the very school officials whose conduct Congress sought to regulate. *Amici* ask only that the Court enforce the statute as written.

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[38] There is no need for this Court to resolve subsidiary issues such as media access in this proceeding. At this point such issues are entirely abstract, and they might never arise. For example, until the day of her testimony respondent Bridget Mergens "didn't know Westside really had a P.A. system because I don't remember it ever being used when I was a student there" (J.A. 83). If these subsidiary issues do arise, they should be considered in light of a full evidentiary record.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 88-1597

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IN THE

Supreme Court of the United States

OCTOBER TERM 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, CHRISTIAN LEGAL SOCIETY, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, NATIONAL ASSOCIATION OF EVANGELICALS, NATIONAL COUNCIL OF CHURCHES OF CHRIST IN THE U.S.A., AND JAMES E. ANDREWS AS STATED CLERK OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether public school officials may prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other students groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

This question arises under the Equal Access Act, 20 U.S.C. §§ 4071-4074, and in the alternative, under the Speech and Religion Clauses of the First Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. WESTSIDE HIGH SCHOOL HAS A LIMITED OPEN FORUM AS THAT TERM IS DEFINED IN THE EQUAL ACCESS ACT. THE SCHOOL'S CONTRARY INTERPRETATION WOULD EFFECTIVELY REPEAL THE ACT	6
A. The Congressional Purpose Was to End a Pattern of Content Discrimination Against Student Religious Speech	6
B. WHS Claims Discretion That Is Essentially Unlimited	13
C. Discretion Cannot Be Entrusted to WHS, Because WHS Rejects Every Important Premise of the Congressional Policy	15
II. ENFORCEMENT OF THE EQUAL ACCESS ACT AT WHS WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE	17
III. EXCLUSION OF PLAINTIFFS' CLUB VIOLATES THEIR RIGHTS OF FREE SPEECH, FREE EXERCISE, AND ASSOCIATION	24
A. WHS's Policy Violates Plaintiffs' Rights to Speech and Association	24
1. A School Is a Traditional Forum for Its Students and Faculty	24
2. WHS's Policy Violates Rights of Free Speech and Association Even If the School Is Not Characterized as a Traditional Forum	26
B. WHS's Policy Violates Plaintiffs' Right to Free Exercise of Religion	28
CONCLUSION	29

TABLE OF AUTHORITIES

Cases — Page

Abington School District v. Schempp, 374 U.S. 203 (1963) 17, 21
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 25, 27, 29
Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 19, 27
Board of Education v. Pico, 457 U.S. 853 (1982) .. 24, 25
Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788 (1985) 24, 26
Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) 29
County of Allegheny v. ACLU Greater Pittsburgh Chapter, 109 S. Ct. 3086 (1989) 17, 23
Edwards v. Aguillard, 482 U.S. 578 (1987) 22
Epperson v. Arkansas, 393 U.S. 97 (1968) 25
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) 25, 26, 27
Healy v. James, 408 U.S. 169 (1972) 5, 20, 28
Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 19, 20
Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1986) 29
Honig v. Doe, 484 U.S. 305 (1988) 15
Kunz v. New York, 340 U.S. 290 (1951) 20
Largent v. Texas, 318 U.S. 418 (1943) 28
Lemon v. Kurtzman, 403 U.S. 602 (1971) 21
Mergens v. Board of Education, 867 F.2d 1076 (8th Cir. 1989) 8
Niemotko v. Maryland, 340 U.S. 268 (1951) 20
Poulos v. New Hampshire, 345 U.S. 395 (1953) .. 19, 20
School District v. Ball, 473 U.S. 373 (1985) 22
Shelton v. Tucker, 364 U.S. 479 (1960) 25
Stone v. Graham, 449 U.S. 39 (1980) 21
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) ..... *passim*
Walz v. Tax Commission, 397 U.S. 664 (1970) 29
Widmar v. Vincent, 454 U.S. 263 (1981) ..... *passim*
Wong Yang Sung v. McGrath, 339 U.S. 33 (1950) .. 7

TABLE OF AUTHORITIES—Continued

Statutes and Congressional Materials — Page

Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. V 1987) ..... *passim*
20 U.S.C. § 4071(a) 19
20 U.S.C. § 4071(b) 8, 19
20 U.S.C. § 4071(c)(2) 16, 19
20 U.S.C. § 4071(c)(3) 16, 19
20 U.S.C. § 4072(3) 10
Equal Access Act, Report of the Senate Comm. on the Judiciary on S. 1059, Senate Report No. 98-357 ..... 7, 16, 22
Equal Access Act, Report of the House Comm. on Education and Labor on H.R. 5345, House Report No. 98-710 7
Sen. Dole, 130 Cong. Rec. S 8362 (daily ed. June 27, 1984 10
Sen. Hatfield, 130 Cong. Rec. S 8342 (daily ed. June 27, 1984) 9, 10-11
Sen. Leahy, 130 Cong. Rec. S 8341 (daily ed. June 27, 1984) 9
The Equal Access Act Guidelines, 130 Cong. Rec. S 14,475 (daily ed. Oct. 11, 1984) 12

Constitutional Provisions

Establishment Clause ..... *passim*
Free Exercise Clause ..... *passim*
Free Speech Clause ..... *passim*

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NATIONAL ASSOCIATION OF EVANGELICALS,
NATIONAL COUNCIL OF CHURCHES
OF CHRIST IN THE U.S.A.,
AND JAMES E. ANDREWS AS STATED CLERK
OF THE GENERAL ASSEMBLY OF THE
PRESBYTERIAN CHURCH (U.S.A.),
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI CURIAE

The amici joining in this brief represent more than eighty million Americans. These amici are religious organizations that accept this Court's decisions prohibiting government-sponsored prayer in the public schools. Three of these amici have consistently opposed constitutional amendments that would have permitted school sponsored prayer. None of these amici have supported such amendments.

Each of these amici support the principles of the Equal Access Act. They saw that the Act was not an attempt to evade this Court's decisions, but rather an attempt to remove state-imposed obstacles to the speech and religious exercise of students, extending to high schools the sound principles of *Widmar v. Vincent*, 454 U.S. 263 (1981).

After the Equal Access Act was adopted, all but one of these amici joined in an unusual work of clarification and reconciliation, brought about by the late John Baker, General Counsel of the Baptist Joint Committee. Mr. Baker convened experts from organizations that had favored the Act and from organizations that had opposed it. Together, they negotiated a set of Guidelines for implementation of the Act.

Because of their long involvement in the enactment and implementation of the Equal Access Act, these amici bring expertise and experience to the case. They have joined in this brief because the positions taken by Westside High School threaten to make the Act a dead letter. A description of the individual amici follows.

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference, National Baptist Convention of America; National Baptist Convention, U.S.A.; North American Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These constituent bodies have a total membership of approximately thirty million. This brief reflects the traditional Baptist commitment to religious liberty and its political corollary of church-state separation. Because of the congregational autonomy of individual Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Christian Legal Society is a non-profit, professional association of 4,000 judges, attorneys, law professors, and law students, founded in 1961. The Society receives many complaints from high school students who have been denied their rights to religious speech and exercise in the public schools. As a result of such complaints, the Society has been active in the controversy over equal access from the beginning. This brief reflects the Society's concern for the appropriate accommodation of religion and the protection of the religious speech rights of public high school students.

The Church of Jesus Christ of Latter-day Saints (also known as the Mormon Church) has approximately 4 million members in the United States. The Church firmly supports the principles of religious freedom embodied in the Equal Access Act.

The National Association of Evangelicals is a nonprofit association of evangelical Christian organizations, colleges, and universities, as well as some 50,000 churches from 74 denominations. The Association serves a constituency of approximately fifteen million people.

The National Council of Churches of Christ in the U.S.A. is a community of communions composed of thirty-two religious bodies having over forty million constituents in the United States. It is commonly known as the National Council of Churches. Its public positions are based on policies adopted by its Governing Board, composed of about two hundred fifty members selected by the member denominations in proportion to their size and support of the Council.

James E. Andrews, as Stated Clerk of the General Assembly, is the continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 172 presbyteries under the jurisdiction of 16 synods. This brief does not purport to reflect the views of all Presbyterians. The brief is based on a comprehensive policy statement on religious liberty, adopted by the General Assembly. The policy statement

specifically opposes any form of government sponsorship for religious observance, and specifically endorses the equal access rights of voluntary student religious clubs.

Through their counsel, the parties have given consent to the filing of this brief.

SUMMARY OF ARGUMENT

This case is one of many similar controversies arising over a period of many years at public schools throughout the nation. The persistent issue arises from widespread misunderstanding of this Court's decisions forbidding government-sponsored prayer in the public schools. Some educators have come to believe that all religious speech must be extirpated from the schools. Others will permit religious speech by individual students, but forbid students to meet as a group to discuss religion.

These educators have failed to comprehend the distinction between speech by the school and speech by the students—between government sponsorship of religion and government toleration of religious exercise. In their zeal to enforce the Establishment Clause, they have trampled on the Free Speech and Free Exercise Clauses. They have distinguished away this Court's clarifying decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), and they now seek to eviscerate an Act of Congress.

If this Court adopts Westside High School's interpretation of the Equal Access Act, the Act will become a dead letter. WHS proposes judicial deference to such unreviewable administrative discretion that compliance with the Act would for all practical purposes be voluntary.

Of course not all local school officials are hostile to the Equal Access Act. And some who appear hostile are honestly trying to comply with what they understand to be the mandate of this Court's decisions. But this case shows that at least some local school officials fundamentally reject each and every premise on which Congress acted. This Court should not entrust broad statutory discretion to officials who are so hostile to the statute.

Rather, this Court should correct the misunderstanding of its own decisions and vindicate the authority of Congress.

Congress enacted an objective statutory test to trigger application of the Equal Access Act. If one noncurriculum related student group is allowed to meet, other groups must be allowed to meet as well. Congress chose this objective test because it feared evasion of the Act. For this objective test to serve its purpose, "noncurriculum related" must be understood in its common and objective sense. Thus the sponsors explained that curriculum related groups are those groups that are directly related to a particular course, such as the French club. WHS would evade the Act by claiming discretion so broad that it could designate any club as curriculum related.

Enforcing the Equal Access Act at WHS will not violate the Establishment Clause. WHS has artifically created an Establishment Clause issue by insisting that it must sponsor every group that meets in the school, and that it must suppress every group it does not sponsor. This position ignores the facts, the Act, and the case law. The plaintiff students do not seek sponsorship; they seek only the opportunity to meet on a regular basis. The Act expressly provides that WHS cannot sponsor a religious group. And this Court has held that official recognition of a student group is not sponsorship, but rather a constitutional entitlement. *Healy v. James*, 408 U.S. 169, 182-84 (1972). If plaintiff's club simply meets without sponsorship, as the Act provides, the Establishment Clause issue disappears.

Plaintiffs also have valid constitutional claims, although it is unnecessary to decide them. WHS's policies violate plaintiffs' right to speak and to associate for purposes of speech. The school is a traditional forum for its students and faculty. This is something less than a traditional *public* forum, but a great deal more than a limited public forum in which the right to speak depends on the intent

of the school board. Schools are peculiarly the marketplace of ideas, and they are inherently a forum for quiet discussion.

Plaintiffs' club is entitled to meet even if the school is not characterized as a forum. The students are entitled to be at the school, and they do not surrender their rights at the schoolhouse door. The right to speak individually, or to meet informally and irregularly, is not a substitute for the right to meet as an organized group, guaranteed by the constitutional right of association. This right can be denied only for a substantial educational reason. WHS's misunderstanding of the Establishment Clause is not such a reason.

Finally, WHS's policy violates the Free Exercise Clause. Religious speech is a part of free exercise, singled out for the highest level of First Amendment protection. The right of religious groups to meet is also part of the right to free exercise. And WHS's policy is hostile to religion, violating the duty of neutrality imposed by both religion clauses.

ARGUMENT

I. WESTSIDE HIGH SCHOOL HAS A LIMITED OPEN FORUM AS THAT TERM IS DEFINED IN THE EQUAL ACCESS ACT. THE SCHOOL'S CONTRARY INTERPRETATION WOULD EFFECTIVELY REPEAL THE ACT.

A. The Congressional Purpose Was to End a Pattern of Content Discrimination Against Student Religious Speech.

The Congressional Committee that recommended the Equal Access Act found a persistent pattern of discrimination against religious speech by students. The Senate Judiciary Committee found:

> Despite *Widmar*, many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity. Like the judges of the district court in *Widmar*, they

> erroneously believe that the Establishment Clause prohibits students from engaging in such speech at all, even when other types of extracurricular student speech are permitted. Generally, those administrators act not from malevolence toward religion but from ignorance of the law and erroneous legal advice. A primary source of their confusion has been the lower Federal courts.

Equal Access Act, Report of the Senate Comm. on the Judiciary on S. 1059, Senate Report No. 98-357 at 6 (reprinted in U.S. Code Cong. & Ad. News, 98th Cong., 2d Sess. at 2348 (1984). The Committee reported many cases of discrimination against student religious speech. *Id.* at 11-18. The Committee found that many schools prevented religious groups from meeting, and that some schools even tried to prevent individual students from discussing religion in the halls or in the parking lot, or from saying grace over their meal in the cafeteria. *Id.* at 11-12, 16-18. The House Committee made similar but less detailed findings. Equal Access Act, Report of the House Comm. on Education and Labor on H.R. 5345, House Report No. 98-710, at 3-4.

It was this pattern of discrimination by local school boards that made the Equal Access Act necessary. To be sure, the Act is not limited to religious speech. The Act treats the pattern of discrimination against religious speech as a special case of content discrimination. When the Act applies, it protects religious and secular speech alike.

But in deciding when the Act applies, courts must interpret it in a way that solves the problem Congress was trying to solve. "It is the plain duty of the courts, regardless of their views of the wisdom or policy of the Act, to construe this remedial legislation to eliminate, so far as its text permits, the practices it condemns." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 (1950).

The evil to be remedied is clearly identified in the Committee reports. Congress found that many school boards, left to choose a course through conflicting legal

advice and local pressure groups, would discriminate against religious speech. If local school boards have unlimited discretion to decide whether the Act applies, that discrimination will continue. As the Court of Appeals correctly held, broad discretion in the school boards would lead to "exactly the result that Congress sought to prohibit." 867 F.2d at 1078.

The statutory definition of "limited open forum" must be read in light of the Congressional findings and purpose. WHS tries to equate the statutory standard with the constitutional standard, even to the point of falsely claiming that "Congress twice used the term of art 'limited public forum.'" Brief of Petitioners at 59-60 n.24. This misquotes the statute. Congress avoided the term of art, presumably deliberately, and used its own term with its own definition. Thus, a statutory "limited *open* forum" is emphatically not the same as a constitutional "limited *public* forum." Rather, the statutory "limited open forum" is expressly defined in 20 U.S.C. § 4071(b):

> A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

This definition makes the existence of a statutory forum depend on an objective standard—one or more noncurriculum related student groups. Unlike this Court's definition of a constitutional limited forum, a statutory forum does not depend on the intent of the school board. The judicial inquiry under the statute is into the existence of a single noncurriculum related group, not into the school board's intent.

The statutory definition is sweeping as well as objective. The most striking thing about the definition is the phrase "one or more"—a single noncurriculum related group creates a statutory forum. This part of the definition also goes well beyond this Court's cases on constitutional limited forums.

This sweeping and objective standard can be understood only as a remedial measure to prevent local school boards from continuing the content discrimination that Congress sought to end. The standard is objective and sweeping because its drafters feared evasion and resistance. Senator Leahy, who together with Senator Hatfield drafted the final language of the bill, explained that the concept of the limited open forum is "the very heart of the bill." 130 Cong. Rec. S 8341 (daily ed. June 27, 1984). He went on to say that the limited open forum "should be triggered by what a school does, not by what it says." *Id.* Without the objective standard of a single noncurriculum related group, he feared that schools could avoid the Act with a resolution declaring a closed forum, and then "consider any student group wanting to meet on school premises during noninstructional time on a case-by-case basis." *Id.* WHS's policy fits Leahy's prediction. WHS says that nothing can meet without school sponsorship and a relationship to the curriculum, and then it decides which groups can meet: service clubs are in, scuba diving is in, religion is out. The remedial purpose of the statute is wholly defeated if courts are too deferential to local school boards on the question of which groups are curriculum related.

The explanations of other sponsoring Senators are fully consistent with the definition's remedial purpose. Senator Hatfield, the principal Senate sponsor, offered this explanation:

> [I]n a number of schools, students in a class of Spanish or French will form a French club or a Spanish club where they get together to talk nothing but that language, to get conversational proficiency. We are recognizing that as really a kind of extension of the classroom. That is the kind of category of clubs that we are trying to incorporate as curriculum related." *Id.* at S 8342.

The French club is related to the curriculum in the sense that it directly serves a particular course that is offered for credit as part of the ordinary curriculum.

That is what Hatfield appears to have meant by "an extension of the classroom." Brief of Petitioners at 72. Senator Dole, another sponsor, offered the example of "extracurricular field trips taken by a science class" as curriculululum related, and he said that the limited open forum included "those student group meetings that are not *directly* related to the school's curriculum." *Id.* at S 8362 (emphasis added). The need for a direct link to curriculum is also suggested by the statutory definition of "meeting": an activity of a student group that is not "directly related to the school curriculum." 20 U.S.C. § 4072(3). WHS claims that all its clubs are "an extension of the classroom," Brief of Petitioners at 72, but it ignores the illustrations that give meaning to the phrase.

The sponsors' explanations of "curriculum related" fit the common sense understanding of curriculum, the sense in which the word would be used by legislators who are not educational theorists. Their explanations are consistent with the common distinctions among "curricular," "co-curricular," and "extra-curricular," distinctions that WHS would obliterate. Even WHS occasionally slips into more sensible usage, when it says that curriculum is "*part of* the 'total learning experience,'" Brief of Petitioners at 20 (emphasis added), and when it distinguishes "the School's curriculum" from "its overall program." *Id.* at 15. Of course extra-curricular activities are educational, useful, and related to the total learning experience. But that does not make them part of the curriculum in ordinary speech or in the meaning of the Equal Access Act.

Following Senator Hatfield's initial explanation, Senator Gorton skillfully cross-examined him about the meaning of curriculum related. In response to this unfriendly interrogation, Hatfield predicted that school board lawyers would find ways to evade the statute: "I cannot readily conceive of a criterion that could be used at this time to establish [a chess club] as a curriculum related activity. I am not saying it could not be, because as long

as you have lawyers, they can find ways of doing things one way or another." 130 Cong. Rec. at S 8342.

WHS seizes on this prediction about chess clubs, stopping its quotation just before Hatfield's despairing description of lawyers. Brief of Petitioners at 65. And of course WHS claims what Hatfield could not readily conceive of—that its chess club is curriculum related.

This same interrogation produced Hatfield's statement that the statute would not limit school board discretion to define what is curriculum related. *Id.* at 64. The only meaning of this statement consistent with the purpose of the statute is entirely uncontroversial: the Act does not interfere with local control of curriculum. The Act does not speak to the meaning of "curriculum related" for any purpose other than determining the Act's applicability. The Act does not control the school board's theory of curriculum; the board can continue to teach anything it wants, to sponsor any clubs it wants, and to consider them part of the curriculum if it wants.

But WHS cannot apply its infinitely elastic concepts of curriculum to the interpretation of a federal statute. Gorton's cross-examination attempted to apply Hatfield's answer about local control to the question of when the statute applies, and this effort led to Hatfield's statement that chess clubs are not curriculum related but that a clever lawyer might seek to make them so. Gorton was trying to make Hatfield explain the statute in a way that would destroy it. The whole point of the statute was to restrict the discretion of local school boards on one narrow but important issue—the recognition of voluntary student groups.

One ambiguous answer to a hostile question cannot control unambiguous evidence of Congressional purpose. The issue need not depend on speculation about Hatfield's state of mind, or on any preference for one snippet of floor debate over another. The issue is more reliably resolved by considering the evil the statute was designed to cure, the role of the definition of "limited open form"

in curing that evil, and the meaning of "noncurriculum related" necessary to cure that evil. The entire purpose of the statute depends on a narrow definition of curriculum related, committed in the first instance to local school boards but subject to substantial judicial review in light of the statutory purpose. A sweeping and largely unreviewable discretion, committed to the officials whose behavior Congress was trying to control, would make the statute nugatory.

After the statute was enacted, a very broad set of interested organizations agreed that "curriculum related" requires a direct relationship to curriculum. In their carefully negotiated Guidelines on the Act, the groups agreed as follows:

> A noncurriculum related student group is a group or club which is interested in a subject matter *not directly related to the school curriculum.* The math club, the Spanish club, the drama club and athletic teams would normally be curriculum related. A religious club, political club or *service club* would be considered noncurriculum related.

130 Cong. Record S 14,475 (daily ed. Oct. 11, 1984) (emphasis added).

Of course these Guidelines are not part of the legislative history. But they were negotiated by the American Association of School Administrators, the National Education Association, the American Civil Liberties Union, and several religious groups, and accepted by the American Federation of Teachers, Americans United for Separation of Church and State, and People for the American Way. All but one of the amici joining in this brief subscribed to these Guidelines, as did many of the amici now supporting WHS. Senator Hatfield inserted these Guidelines into the Congressional Record, explaining that supporters and opponents of the Act had at least been able to agree on what the Act meant.

The broad acceptance of these Guidelines by educational associations indicates the unreasonableness of WHS's

claim that its several service clubs are curriculum related. WHS also claims that its chess club is curriculum related, even though the chess club was one of the most commonly offered Congressional examples of a club that is not curriculum related. Similarly, WHS claims that its scuba diving club is curriculum related, even though there is no course in scuba diving and the club is both attended and taught by outsiders who are neither students nor faculty. J.A. 167-68 (Tr. 174); J.A. 175 (Tr. 185-86); J.A. 236-39 (Tr. 282-85).

If the Act does not apply to WHS, it is hard to imagine a school where the Act would apply. If WHS had political clubs, it would say that they are related to courses in social studies, government, and sociology. There is no club that cannot be related to the curriculum with sufficient imagination. As Senator Hatfield said, "as long as you have lawyers, they can find ways of doing things one way or another." But that is not an interpretation of the statute; it is a formula for evading the statute.

B. WHS Claims Discretion That Is Essentially Unlimited.

It is revealing to examine the language in which WHS couches its claims of curriculum relatedness. WHS says that each of the clubs was "intended to further *either* the goals and objectives of specific aspects of the School's *curriculum or of its overall program.*" Brief of Petitioners at 15 (emphasis added). Several of the clubs are said to be "related with the functioning of the School as an institution." *Id.* The curriculum is "part of the 'total learning experience.'" *Id.* at 20. Curriculum includes "all the school-related experiences provided for the growth and development of pupils." *Id.*

The clubs are "part of the School's educational program." *Id.* at 49. Welcome to Westside is a vehicle "for furthering institutional needs." *Id.* at 79. "WHS has an interest" in the work of this club, and "it is surely reasonable" to delegate its work to students instead of staff. *Id.* at 78-79.

Taken together, these formulations equate "curriculum related" with useful. WHS expands "curriculum related" first to "educational," then to the "total learning experience," then to its "overall program," and finally to "school-related." "School-related" is not limited to curriculum, or even to "educational" programs; it includes "institutional needs" as well. Indeed, "school-related" is broad enough to include anything in which the school has "an interest," or anything which is "reasonable." These are no standards at all, and they are not plausible synonyms for "curriculum related." These are labels for letting the school do anything it wants.

Dr. Findlay, the school principal, made this claim more directly in his testimony at trial. For him, the question whether a club is curriculum related is wholly tautological. If it is a club, then it is curriculum related:

> Curriculum to me includes all of our required courses, our elective courses, all the activities and clubs, [and a number of other things as well], but definitely I've always though of activities as part of our curriculum.

J.A. 220 (Tr. 263).

His response to a question about Cheerleaders was even more tautological: [1]

> Q. And what curriculum is it related to?
> A. Activities and clubs.
> Q. I beg your pardon?
> A. Activities and clubs.
> Q. Is it your testimony that Cheerleaders is curriculum-related because it is part of the clubs and activities at Westside High School?
> A. That's right.
> Q. That's the reason it is?
> A. It's part of the curriculum. I think the curriculum at Westside High School includes activities.

J.A. at 222-23 (Tr. at 266).

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[1] Amici do not claim that Cheerleaders alone would trigger application of the Equal Access Act. It may be that cheerleaders are such official spokespersons for their school that they are not a student group at all for purposes of the Act. *See* Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 41 (1986) (discussing debate team, school play, and school chorus). The testimony in text is quoted to show Dr. Findlay's all-inclusive definition of curriculum.

This is not the testimony of a school administrator who has considered in good faith how the Equal Access Act applies to his school. Rather, he believes that it is tautologically impossible for the Equal Access Act ever to apply. If a club exists, it is curriculum related, and no matter how many clubs exist, no new club can be created without his permission. The school licenses group speech, and its discretion is absolutely unfettered. That is the school's position. Its lawyers have dressed it up a little in the brief, but they claim a discretion broad enough to let the principal adhere to his own theory.

On most issues of educational policy, WHS does have broad discretion. But on a few issues, where there is an overriding federal policy, the Supremacy Clause requires compliance. This Court has unhesitatingly enforced the law on occasions when Congress directed far greater intrusions into far more central educational decisions. *See, e.g., Honig v. Doe*, 489 U.S. 305 (1988) (refusing to imply a dangerousness exception into the Education of the Handicapped Act). The Equal Access Act is narrower, but it also declares an overriding federal policy. It restricts the school's discretion to exclude student speech and association. For purposes of the Act, this Court must interpret "curriculum related" in a way that serves the Congressional purpose.

C. Discretion Cannot Be Entrusted to WHS, Because WHS Rejects Every Important Premise of the Congressional Policy.

WHS believes that the statute is unconstitutional, wrongheaded, self-contradictory, and bad policy. WHS can hardly be expected to make discretionary judgments that actually implement the statute.

Most obviously, WHS believes that "The Constitution forbids incorporating a religious club into an officially sponsored student activities program." Brief of Petitioners at 81. This is precisely the belief that Congress found objectionable because it discriminated against religious speech.

But the school's rejection of Congressional judgment is not limited to this legal conclusion; it extends as well to every related issue of fact, policy, and characterization. WHS believes that its students are incapable of comprehending that the school does not endorse religion when it allows a religious group to meet. *Id.* at 24, 89. Congress expressly found to the contrary. Senate Report at 10, 34-36.

Congress also found that a school could permit a group to meet without thereby sponsoring the group. Congress expressly provided for meetings at which there would be "no sponsorship of the meeting by the school, the government, or its agents or employees." 20 U.S.C. § 4071(c)(2). WHS believes that such a state of affairs is conceptually impossible—that any group that meets regularly on campus is thereby sponsored by the school. The plaintiff students have asked merely for equal access to a meeting room and to the routine channels of communication within the school. WHS equates this request with a demand for sponsorship. Brief of Petitioners at 13, 82-84.

Congress believed that a policy of equal access could be implemented with faculty sponsors for those groups the school was willing and able to sponsor, and without faculty sponsors for those groups the school was unwilling or unable to sponsor. It expressly provided that the school could not sponsor a religious group; "employees or agents of the school or government" can be "present at religious meetings only in a nonparticipatory capacity." 20 U.S.C. § 4701(c)(3).

WHS rejects this judgment as well. WHS apparently believes that either it must sponsor all groups or no

groups. It claims that if religious clubs can waive a sponsor, so can any other club, including curriculum related clubs, so that its "forum" would be radically restructured. Brief of Petitioners at 54-55.

Amici will respond to some of these arguments later in this brief. The point here is that WHS rejects the Congressional view of the First Amendment, it rejects the Congressional view of student capacity to understand, it rejects the Congressional view of sponsorship, and it rejects the Congressional conception of equal treatment. WHS rejects every aspect of the Congressional policy. Yet it claims unlimited discretion in implementing that policy. This combination is a sure formula for de facto repeal of the statute. If WHS has its way, content discrimination against student speech will continue unimpeded, in the guise of defining what is curriculum related.

Of course this Court defers to local school boards where appropriate. But this Court also defers to Congress. In the face of such fundamental conflict between the judgments of Congress and the judgments of a local school board, this Court cannot defer to both. But the mandate of the Supremacy Clause is clear: Congress's resolution of these questions must prevail.

II. ENFORCEMENT OF THE EQUAL ACCESS ACT AT WHS WOULD NOT VIOLATE THE ESTABLISHMENT CLAUSE.

WHS's Establishment Clause argument depends on two legal errors: its refusal to comply with the sponsorship provisions of the Equal Access Act, and its profound misunderstanding of this Court's decisions. WHS would create the latent or passive hostility to religion against which this Court has repeatedly warned. *See, e.g., County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3110 (1989); *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963); *id.* at 295 (Brennan, J., concurring).

It is common ground that WHS cannot sponsor a religion club. To do so would endorse religion in violation

of a long line of decisions from this Court. *See County of Allegheny*, 109 S. Ct. 3086, 3099-3101 (1989). School sponsorship is also objectionable because it would invade the autonomy of the religious club, inevitably influencing choices within the club and changing the religious experience of its members. When government undertakes to direct religious activity, believers as well as nonbelievers are the victims. Thus, amici's disagreement with WHS is not over the permissibility or the desirability of school sponsorship.

Rather, our disagreement is over the meaning of sponsorship, and more fundamentally, over the role of unsponsored groups in a free society. WHS insists that it *must* sponsor every group that meets on campus, and therefore, WHS concludes that it *does* sponsor every group that meets on campus. Because it insists on suppressing everything it does not sponsor, it concludes that mere failure to suppress is sponsorship. Only in this way could WHS repeatedly characterize the plaintiffs' request for permission to meet and to use the routine channels of school communication as a request for sponsorship. Brief of Petitioners 31-32, 83-89, 91.

WHS says that students are free to discuss religion informally, and even to meet informally, *id.* at 6, 13, 51, so it must be sponsorship that the plaintiffs are seeking. But this claim about informal meetings ignores the significance of a critical undisputed fact. Informal meetings could not be "so regular that they were simply a form of club, without faculty sponsorship." *Id.* at 13. A club without faculty sponsorship is exactly what plaintiffs want, and exactly what WHS forbids. The school principal "would not allow any group, not even a checkers club, to meet regularly without official sponsorship." *Id.* at 13.

WHS's Establishment Clause argument thus amounts to a self-imposed Catch-22. Plaintiffs do not want school sponsorship, Congress does not want them to have school sponsorship, the Establishment Clause will not permit them to have school sponsorship, but WHS insists that

they must have school sponsorship and that school sponsorship makes the students' meetings unconstitutional. The Establishment Clause issue is manufactured out of nothing by WHS's insistence that it must sponsor every group that meets on campus.

WHS's rule that no group can meet without official sponsorship is precluded by the Equal Access Act. The Act provides that if the school permits one or more noncurriculum related groups on campus, it must permit other groups to meet as well, 20 U.S.C. § 4071(a) and (b). The Act further provides that WHS cannot sponsor or participate in any religious group. § 4071(c)(2) and (c)(3).[1] It is therefore unnecessary to decide whether WHS's policy of suppressing all it does not sponsor is unconstitutional. WHS can comply with the Act only by permitting plaintiffs' club to meet without sponsorship. If WHS would simply accept this statutory directive, the establishment clause issue would disappear.

An unsponsored religion club presents no serious Establishment Clause issue. Such a club would be wholly voluntary, initiated and run by students. Its speech and activities would be the speech and activities of private citizens, not the speech and activities of government.

Private speech is not converted to government speech simply because it takes place on government property, and this Court has long upheld the rights of religious speakers to speak on public property. *See Widmar v. Vincent*, 454 U.S. 263 (1981) (directing state university to allow religious club to meet on campus); *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (permitting religious proselytizing in public airport); *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (applying same standards to religious and secular solicitation from booths at state fair); *Poulos v. New Hamp-*

[1] It is not seriously disputed that this is what the statute means. Certain syntactical ambiguities in the literal text are analyzed and explained in Laycock, *supra* note 1, at 42-45.

shire, 345 U.S. 395 (1953) (holding that persons desiring to hold church service in public park may be required to obtain license, where licensing authority acts under reasonable and nondiscriminatory standards); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (protecting church service in public park); *Kunz v. New York*, 340 U.S. 290 (1951) (protecting church service in public street).

These cases were not decided in ignorance of the Establishment Clause implications. The Establishment Clause issue was squarely decided in *Widmar*. It was also briefed in *Niemotko*, see Joint Brief for Appellants at 18-24, Joint Brief for Appellees at 17-20, and it was raised in dissent in *Kunz*, 340 U.S. at 311 n.10 (Jackson, J., dissenting). Opponents of religious speech in the other cases did not find it worthwhile even to argue the Establishment Clause issue.

Nor is it sponsorship for government to recognize that religious speech is occurring or to subject it to nondiscriminatory allocation of space. No one suggested that government's nondiscriminatory allocation of a booth at the state fair in *Heffron*, or of a license to meet in the park in *Poulos*, would be a form of sponsorship that converted private religious speech into a violation of the Establishment Clause. The student request for recognition as a club entitled to use school facilities on an equal basis with other clubs seeks no more. Official recognition is merely a grant of permission to function; it is not sponsorship unless WHS makes it so.

This Court decided the meaning of sponsorship in the context of student organizations in *Healy v. James*, 408 U.S. 169 (1972). *Healy* was not decided under the Establishment Clause, and it involved a university instead of a high school. But the arguments actually presented and decided were quite similar to the arguments here. Plaintiffs in *Healy* sought to have the university officially recognize their chapter of Students for a Democratic Society. As at WHS, official recognition was prerequisite to the right to meet on campus and to use the campus channels

of communication. *Id.* at 176. And like WHS, school officials argued that the students could meet off campus, and even "meet together informally on campus—as individuals, but not as" an organized group. *Id.* at 182-83. Thus, the school concluded, what the students really sought was the "college's stamp of approval," the "administrative seal of official college respectability." *Id.* at 182. This Court unanimously rejected the argument, holding instead that "the College's denial of recognition was a form of prior restraint." *Id.* at 184. The same analysis applies here.

An unsponsored religion club readily meets the three part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The secular purpose of permitting an unsponsored religion club is to implement the constitutional requirement of neutrality—to avoid discriminating against religious speech, and thus to avoid both the appearance and the reality of hostility to religion. When the school permits a wide range of other clubs and forbids a religion club, it sends an unambiguous message of hostility to religion. Just as discrimination in favor of religion would send an improper message of endorsement, discrimination against religion sends an improper message of hostility. Equal access is not endorsement, but unequal exclusion is repudiation.

The primary secular effect of permitting an unsponsored religion club is to implement the secular purpose of neutrality. Because the club would be unsponsored, there would be no religious effect of school endorsement or sponsorship. Interested students would have to seek out the club's meetings; unlike the school-sponsored religious activities that this Court has properly struck down, uninterested students would not be socially pressured to participate in religious observances or displays in their classrooms. *Cf. Stone v. Graham*, 449 U.S. 39 (1980) (display of Ten Commandments on classroom bulletin board); *Abington School District v. Schempp*, 374 U.S. 203 (1968) (teacher-led prayer and Bible reading).

Without a faculty sponsor, there would be no entanglement between state and religion. If the school chooses to send a nonparticipating room monitor on occasion, the monitor's only role is to preserve order. That role is unrelated to the subject matter of the meeting, and unaffected by it. He must enforce the same disciplinary rules he would enforce if the club did not exist, or if it met to discuss philosophy, social studies, or football. The nonparticipating room monitor is not excessively entangled in religion.

WHS offers one final objection to equal access, while insisting that the Court need not decide it. This is the claim that high school students will misunderstand and think that the school sponsors the religion club if it fails to suppress it. Brief of Petitioners at 24, 89-91. This claim that high school students are too "impressionable" to understand free speech and free exercise is inconsistent with the Congressional findings, Senate Report at 10, 34-36, with the testimony of the expert educational psychologist below, J.A. 379-400 (Tr. 540-61), and with the dominant scholarly understanding of human development. Citations to the scholarly literature are collected in Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-09 (1983).

The claim that high school students will misunderstand is also inconsistent with this Court's holding that high school students are mature enough to exercise their rights to free speech in and about the school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). This Court's holdings to the effect that high school students are more impressionable than college students all came in the very different context of government speech. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 587 (1987) (teaching of creation science in science courses in public schools); *School District v. Ball*, 473 U.S. 373, 383, 385 (1985) (public school teachers teaching at public expense in parochial schools). These cases assume that high school students are likely to believe what their teachers say, so that government sponsorship of religion is likely to influence them. These cases are irrelevant to the issue here, which is whether high school students can tell the difference between what their teachers and administrators say and what their classmates say.

But most important, WHS's claim that high school students cannot understand is self-defeating. If high school students cannot understand that letting a religion club meet is not sponsorship, then they certainly cannot understand that driving a religion club off campus is not hostility. What students at WHS see now is that their school officials will spend large sums of money and years of litigation to keep a religion club off campus. Whatever motivations exist in the minds of WHS officials are far more difficult to understand than the difference between student speech and official school speech.

The solution to possible student misunderstanding is not to act on the misunderstanding, but to educate those who misunderstand. With appropriate disclaimers and explanations, the school can easily enough make clear that it does not sponsor the religion club. This Court recently held that an explanatory plaque may adequately disclaim government endorsement of religion even when government itself displays religious symbols. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 109 S. Ct. 3086, 3115 (1989). Some of these amici would not have gone so far. But certainly disclaimers can adequately deal with erroneous attributions to government of private religious speech. WHS would ignore its duty to educate, and instead hold religious speech hostage to the misunderstanding of the least informed or least sophisticated high school student.

Congress correctly judged that voluntary religious clubs can meet without sponsorship. Because WHS rejects even the possibility of an unsponsored club, it asks this Court to hold the Equal Access Act unconstitutional. But the constitutional problem is in WHS's rigidity, not in

the Act. If the Act is enforced as Congress wrote it, the Establishment Clause issue disappears.

III. EXCLUSION OF PLAINTIFFS' CLUB VIOLATES THEIR RIGHTS OF FREE SPEECH, FREE EXERCISE, AND ASSOCIATION.

Because plaintiffs are plainly entitled to prevail on their statutory claim, there is no need to decide their constitutional claims. But even if there were no Equal Access Act, plaintiffs' club would be entitled to meet under the First Amendment.

A. WHS's Policy Violates Plaintiffs' Rights to Speech and Association.

1. *A School Is a Traditional Forum for Its Students and Faculty.*

A school is not a traditional *public* forum, because it is not open to the general public. But neither is it a limited public forum or a nonpublic forum, where speech rights depend wholly on the school board's intention. Rather, a school is a traditional forum for its own students and faculty. As this Court said with respect to university campuses in *Widmar v. Vincent*, and again in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, a campus, "at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius*, 473 U.S. 788, 803 (1985), quoting *Widmar*, 454 U.S. 263, 267 n.5 (1981).

Because *Widmar* involved a university campus, the Court's characterization of the forum naturally refers to a university campus. But this characterization of the campus as a traditional forum follows from a long line of cases, many of which involved high schools. This Court has repeatedly held that the "classroom is peculiarly the marketplace of ideas." *Board of Education v. Pico*, 457 U.S. 853, 877 (Blackmun, J., concurring) (1982); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 512 (1969). "The vigilant protection of

constitutional freedoms is nowhere more vital than in the community of American schools." *Epperson v. Arkansas*, 393 U.S. 97, 104-05 (1968); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). *See also, Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 567 (1988) (high school students "cannot be punished for expressing their personal views on the school premises"); *Board of Education v. Pico*, 457 U.S. 858, 864-71 (1982) (plurality opinion).

Schools are one of the traditional places for debate and discussion, just as the streets and parks are one of the traditional places for parades, rallies, and protests. Of course a school is not the same kind of forum as the streets and parks. Rallies and demonstrations that would be entirely appropriate in a park will often be entirely inconsistent with the educational functions of a school. But a school is inherently a forum for the quiet exchange of ideas. That is what is at issue in this case.

The existence of this forum does not depend on the intention of the school officials. School officials can instruct students in the proper means of debate, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and they can control the speech that the school sponsors, such as articles in the official school newspaper, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). But neither of these cases questioned "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms." *Bethel*, 475 U.S. at 681.

WHS denies that it has a traditional *public* forum, relying principally on evidence that the whole public does not have access to the school for purposes of speech. Brief of Petitioners 33-37. It also cites dictum in *Hazelwood* for the proposition that a high school is not a traditional public forum. 108 S. Ct. at 568. But *Hazelwood* is not at all in point. The only forum issue there was "whether *Spectrum* may appropriately be characterized as a forum for public expression." *Id.* at 567 (emphasis added). Spectrum of course was an officially sponsored school newspaper produced for academic credit in a journalism

class. In the context of that forum, it was entirely appropriate to focus on the school's intention to create "a supervised learning experience for journalism students." *Id.* at 569. Here the constitutional forum is the school's buildings and empty classrooms.

WHS assumes, and some of the dictum in *Hazelwood* may be read to assume, that if a school is not a traditional forum for the whole public, then it can be only a limited forum, so that the openness of the forum depends wholly on the school's intent. But the exclusion of the general public does not entail, either as a matter of logic or policy, that the speech rights of the students and faculty be wholly subjected to the will of the school board. *See Laycock, supra* note 1, at 45-51. Restrictions on the persons who have access to the property is a wholly separate issue from restrictions on the speech rights of those who do have access. The three categories of forums recognized in *Cornelius* cannot be understood to have collapsed these two issues into one, because *Cornelius* itself recognized the possibility of a traditional public forum limited to students. 473 U.S. at 803. Nor can *Hazelwood* be understood to have overruled all the earlier cases on the speech rights of students and faculty, because the newspaper at issue there was so unambiguously sponsored by the school.

2. *WHS's Policy Violates Rights of Free Speech and Association Even If the School Is Not Characterized as a Traditional Forum.*

The speech and association issues in this case can also be decided without characterizing the school as a forum. The absence of a forum means restrictions on access: on who can come to the property, or who can publish in the official school paper. But it does not follow merely from the absence of a forum that the school can censor the speech of students who are in a place where they have a right to be. The presence of a forum may create speech rights that did not previously exist, but the absence of a

forum is not a license to censor everyone who has a right to be there. The Court recognized this distinction and held the issue open in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987).

The students here seek to meet only when the school is open, when they are entitled to be on campus, and when they are not required to be in class. The school recognizes their right to use empty meeting spaces so long as the use is not regular. Brief of Petitioners at 13. Thus, the students seek to speak and to associate for the purpose of group speech in a place where they have a right to be. They seek to speak "on the campus during the authorized hours." *Hazelwood*, 108 S. Ct. at 567, quoting *Tinker*, 393 U.S. at 512-13. The school cannot suppress the exercise of that right except to protect disruption of the educational process, *Tinker*, or to teach a lesson it is entitled to teach, as in *Bethel* and *Hazelwood*.

WHS's suppression of voluntary associations goes much further. School officials claim a monopoly over the initiation of topics for group discussion. No organized group can meet to discuss any topic not sponsored by the school. No organized group can meet to advocate anything. Brief of Petitioners at 11. WHS's insistence that no group can meet without school sponsorship violates the most basic tenets of a free society. "In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. But that is how WHS regards them.

Apparently recognizing that these policies would be wholly indefensible if applied to individual speech, WHS emphasizes that individual students can discuss whatever they want. Brief of Petitioners at 6, 13, 51. But WHS draws the line at an organized group. It is as though speech were a purely individual right, and this Court had never decided a case on freedom of association.

But of course that is not the law. The right to associate for political and religious speech is fundamental. As Professor Tribe has noted, one can imagine a legal

system in which only individual speech was protected, and association for group speech was a punishable conspiracy, but that is not our system. Laurence Tribe AMERICAN CONSTITUTIONAL LAW 1014 (2d ed. 1988).

The mere fact that the students want to meet as a group does not distinguish this case from other high school free speech cases, such as *Tinker*. As this Court held in *Healy v. James*, 408 U.S. 169, 181-82 (1972), students' right to association includes the right to meet in campus facilities and use the school's channels of communication. And if the school makes those rights dependent on official recognition as a student organization, then the right to association includes the right to official recognition. *Id.*

Here there is no claim that the plaintiffs' club would be disruptive. There is no claim that suppression of plaintiffs' club teaches any valuable lesson. There are only legal claims that misunderstand the law. WHS relies on the Establishment Clause, but the Establishment Clause will not be violated. It relies on its policy of suppressing every group it does not sponsor, but that is simply a negation of the constitutional right of association. Once these legal claims are rejected, there remains no legitimate educational interest in suppressing the plaintiffs' club.

B. WHS's Policy Violates Plaintiffs' Right to Free Exercise of Religion.

Restrictions on religious speech violate the Free Exercise Clause as well as the Free Speech Clause. *Largent v. Texas*, 318 U.S. 418, 422 (1943). This is no mere formalistic redundancy. Religious speech is singled out for special protection in the constitutional text. The Free Exercise Clause makes clear what would otherwise be left to implication: that religious speech is at the very core of the First Amendment, one of the most protected categories of speech. The religious speech at issue here is not minimally protected, like the vulgar speech in

Bethel. Rather, it is maximally protected, like the political speech in *Tinker*.

Similarly, religious association is protected by the Free Exercise Clause. "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring). Simple meetings of religious groups—meeting in a place where each member of the group has a right to be—cannot be suppressed without some substantial reason. WHS's reasons consist only of its misunderstanding of the Establishment Clause and its unconstitutional desire to sponsor and control every group that meets on campus.

WHS's policy also violates the Free Exercise Clause because it discriminates against religion. Part of the central message of the religion clauses is that government must be neutral toward religion. "Neither sponsorship nor hostility" is permitted. *Walz v. Tax Commission*, 397 U.S. 664, 672 (1970). Discrimination against religion violates the Free Exercise Clause because it evidences hostility. *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 142 n.7 (1986).

CONCLUSION

This Court should affirm the judgment of the Court of Appeals on statutory grounds. The Equal Access Act applies and is dispositive; WHS's contrary interpretation would eviscerate the Act.

The Act is constitutional. It requires that WHS allow the plaintiffs' club to meet without sponsorship. Without sponsorship, there is no Establishment Clause issue.

Construing the Act in this way makes it unnecessary to decide plaintiffs' constitutional claims, but those claims are also sufficient to support the judgment below.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1989

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS*	1
STATEMENT	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THIS COURT HAS TRADITIONALLY ACCORDED GREAT WEIGHT TO LEGISLATIVE FINDINGS OF LEGISLATIVE FACTS	5
II. THERE IS NO REASON NOT TO ACCORD SUCH WEIGHT TO CONGRESS'S FINDING THAT HIGH SCHOOL STUDENTS CAN DISTINGUISH BETWEEN STUDENTS' RELIGIOUS SPEECH AND STATE-SPONSORED RELIGION	9
A. Both Lower Courts Agreed With Congress's Finding	10
B. Congress's Finding Was Made With Due Deliberation	10
C. Both The Text Of The Act And Its Legislative History Demonstrate That Congress's Purposes Were Proper	12
D. Congress's Finding Is Not In Conflict With This Court's Precedents	13
E. Congress's Finding Makes Good Sense	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Aguilar v. *Felton*, 473 U.S. 402 (1985) 15
Bender v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986) 3, 14
Bose, Corp. v. *Consumers Union of the United States*, 466 U.S. 485 (1984) 10
Brotherhood of Locomotive Firemen & Engineers v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968) .. 9
Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) 5, 6
Edwards v. *Aguillard*, 482 U.S. 578 (1987) 15
Engel v. *Vitale*, 370 U.S. 421 (1962) 15
Katzenbach v. *McClung*, 379 U.S. 294 (1964) 7, 9
Katzenbach v. *Morgan*, 384 U.S. 641 (1966) 6, 7, 9
Lambert v. *California*, 355 U.S. 225 (1957) 9
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 6
Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 15
McCollum v. *Board of Education*, 333 U.S. 203 (1948) 15
Meek v. *Pittenger*, 421 U.S. 349 (1975) 15
Mueller v. *Allen*, 463 U.S. 388 (1983) 12
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 5, 8
Sable Communications of California, Inc. v. *F.C.C.*, 109 S.Ct. 2829 (1989) 5, 6
School Dist. of Abington Twp. v. *Schempp*, 374 U.S. 203 (1963) 14, 15
Stone v. *Graham*, 449 U.S. 39 (1980) (*per curiam*) 15
Student Coalition for Peace v. *Lower Merion School District Bd. of Directors*, 633 F. Supp. 1040 (E.D. Pa. 1986) 12
Texaco, Inc. v. *Short*, 454 U.S. 516 (1982) 8, 9
Tinker v. *DesMoines Independent School Dist.*, 393 U.S. 503 (1969) 16
Vance v. *Bradley*, 440 U.S. 93 (1979) 8
Wallace v. *Jaffree*, 472 U.S. 38 (1985) 13, 14
Walters v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985) 8
West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 16

TABLE OF AUTHORITIES—Continued

Page

Widmar v. *Vincent*, 454 U.S. 263 (1981) ..... *passim*
Witters v. *Washington Dept. of Serv. for the Blind*, 474 U.S. 481 (1986) 12
Zorach v. *Clauson*, 343 U.S. 306 (1952) 14

U.S. CONSTITUTIONAL PROVISIONS:

Amendment I 13, 16

STATUTES AND REGULATIONS:

Equal Access Act, 20 U.S.C. §§ 4071 - 4074 (Supp. V 1987), Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 ..... *passim*
20 U.S.C. § 4071(a) (1982) 2, 12

LEGISLATIVE MATERIALS:

S. Rep. No. 357, 98th Cong., 2d Sess. 35 (1983) .... *passim*
Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elem., Sec. and Voc. Educ. of the House Comm. on Educ. and Labor, 98th Cong., 1st Sess. (1983) 16
Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. (1983) 16
Religious Speech Protection Act, Hearing on H.R. 4996 Before the Subcomm. on Elem., Sec. and Voc. Educ. of the House Comm. on Educ. and Labor, 98th Cong., 2d Sess. 45 (1984) 11
130 Cong. Rec. 19,238-39, 19,239-40 (1984) 11
130 Cong. Rec. 20,936 (1984) 11

MISCELLANEOUS:

Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983) 11, 16
Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1597

BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66), *et al.*,
Petitioners,

v.

BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE KNIGHTS OF COLUMBUS IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS*

Amicus curiae Knights of Columbus is an organization of 1.4 million members, and has a long history of advocating family rights and educational freedom. For example, *amicus* underwrote much of the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Moreover, many members of *amicus* are parents of children in public schools. *Amicus* is therefore greatly concerned that an erroneous view of this Court's precedents is re-

sulting in public school authorities censoring students' speech daily on the basis of its religious content.

All parties have consented to the filing of this brief.

STATEMENT

The Equal Access Act ("the Act"), 20 U.S.C. §§ 4071 - 4074 (Supp. V 1987), Pub. L. No. 98-377, Tit. VIII, 98 Stat. 1302 *et seq.*, makes it unlawful for

> any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).[1] The constitutionality of the Act under the establishment clause was specifically considered by the Congress prior to its enactment, and the Act is premised on an express finding, made after extensive hearings and debate, "that students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led religious speech on the one hand and student-initiated, student-led, religious speech on the other." S. Rep. No. 357, 98th Cong., 2d Sess. 35 (1984); *see id.* at 9-10.

Neither of the lower courts in this case disagreed with that finding. The district court found "[u]nder the facts of this case" that students at Westside High School

[1] The Act codifies, for public high schools receiving federal funds, the result in *Widmar* v. *Vincent*, 454 U.S. 263 (1981). In *Widmar*, this Court held that permitting religiously oriented student groups to use university facilities on the same basis as other student groups would not violate the establishment clause. To the contrary, the Court held that *forbidding* such equal access would violate *students'* rights to freedom of speech and association.

("WHS") could distinguish between school-sponsored religious activity and student-initiated religious activity. Appendix to the Petition for Writ of Certiorari ("Pet. App.") B at 11-12 n.1. And the Eighth Circuit implicitly agreed. That court not only "accept[ed] Congress's fact-finding for purposes of the Act" (Pet. App. A at 20), it also held that "even if Congress had never passed the Act," *Widmar* v. *Vincent*, 454 U.S. 263 (1981), would require WHS not to discriminate against religious speech. Pet. App. A at 20. In so holding, the court of appeals necessarily resolved for itself, in the negative, the question left open in *Widmar*—namely, whether high school students are so much more "impressionable" than college students that the rule in *Widmar* would not apply to them. 454 U.S. at 274 n.14.[2]

SUMMARY OF ARGUMENT

This Court has traditionally accorded great weight to Congress's findings of legislative fact, even when those findings underlie important questions of constitutional law. The Court should accord similar weight to Congress's finding in this case that high school students are mature enough to distinguish between the religious speech of their fellow students and state-sponsored religion.

Indeed, there is no reason for this Court to disagree with that finding. The district court made a similar finding of fact. And the court of appeals not only accepted

[2] In *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986), the Court was presented with, but did not reach, the question whether *Widmar* applied to high schools. Four Justices, including Justice Powell, the author of *Widmar*, would have held that it did. The five Justices in the majority did not reach that question, finding instead that the respondent lacked standing.

Congress's finding, it indicated its own independent agreement with that finding by holding, in the alternative, that *Widmar* v. *Vincent*, 475 U.S. 263 (1981), applies to high school students. Moreover, Congress's finding was made after due deliberation, and both the plain text of the Equal Access Act and its legislative history demonstrate that Congress's finding was in no way pretextual.

Congress's finding does not conflict with this Court's precedents. Although the Court has opined that high school students are less mature than college students for purposes of formal classroom activities, the Court has never stated that they are so impressionable that all religious activity must be banished from public school premises. On the contrary, the Court has protected the First Amendment rights of individual students and has expressly left room for students' voluntary religious activities. Congress's finding also accords with the realities of modern public schools, which tolerate a wide variety of behaviors and ideas. It is simply unrealistic to assume that high school students will view all of those various, and sometimes conflicting, activities as sponsored by the State. In any event, it is at least as likely that students would view denying equal access to student religious groups as official hostility to religion, which is also forbidden by the establishment clause. Finally, the establishment clause cannot require the States to do the impossible and insulate students from the views of their peers. On the contrary, students' speech is affirmatively protected by the free speech and free exercise clauses.

ARGUMENT

Congress's express determination that high school students are mature enough to distinguish between the religious speech of their fellow students and state-sponsored religion is a finding of legislative fact, made after due deliberation, that is well within the competence of the Congress. As such, it should be accorded great weight. Indeed, because there is no reason—in either the facts of this case or the law—to disagree with that finding, it should be accepted by this Court.

I. THIS COURT HAS TRADITIONALLY ACCORDED GREAT WEIGHT TO LEGISLATIVE FINDINGS OF LEGISLATIVE FACTS

"Whenever called upon to judge the constitutionality of an Act of Congress—'the gravest and most delicate duty that this Court is called upon to perform' . . . the Court accords 'great weight to the decisions of Congress.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (citations omitted). This "deference . . . is certainly appropriate when, as here, Congress specifically considered the question of the Act's constitutionality." *Ibid.* It is, of course, this Court's "task in the end to decide whether Congress has violated the Constitution," and "legislative findings" do not foreclose the Court's "independent judgment of the facts bearing on an issue of constitutional law." *Sable Communications of California, Inc.* v. *F.C.C.*, 109 S.Ct. 2829, 2838 (1989). *Ibid.* Nevertheless, Congress's factual findings are entitled to some degree of "deference" and the Court does "not ignore" Congress's conclusions even on pure questions of constitutional law. *Ibid.* As the Court explained in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973), the point is not that it wholly

> defer[s] to the judgment of the Congress . . . on a constitutional question . . . . The point is, rather, that when we face a complex problem with many

> hard questions and few easy answers, we do well to pay careful attention to how the other branches of the Government have addressed the same problem.

412 U.S. at 103. Thus, in that case, the Court stressed that it "must afford great weight to the decision of Congress and the experiences of the [Federal Communications] Commission" in regulating the broadcasting industry, even though the Court was faced with an important question under the free speech clause.[3]

In practice, the Court has often relied on Congressional factual findings that are dispositive of important constitutional issues. In *Katzenbach* v. *Morgan*, 384 U.S. 641, 653 (1966), the Court upheld § 4(e) of the Voting Rights Act of 1965, which nullified New York's English literacy requirement as applied to persons who had completed the sixth grade in accredited Puerto Rican schools, but who could not speak or write English. In upholding that statute under section five of the Fourteenth Amendment, the Court deferred to Congress's determination that

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[3] The Court has stressed that it must give particular scrutiny to Congressional conclusions that statutes do not violate the speech and press clauses. Thus, in *Sable Communications*, *supra*, the Court struck down a flat Congressional ban on all "indecent" dial-a-porn services, despite Congress's finding that such a ban was the only way to prevent "enterprising adolescents" from circumventing other barriers to their patronizing dial-a-porn services. *See also Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843 (1978) (overturning criminal conviction of newspaper under state statute criminalizing "divulging" proceedings of commission investigating charges of judicial disability or misconduct, and stating that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake"). *But see Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 103 (1978) ("afford[ing] great weight to the decision of Congress and the experiences of the" FCC on First Amendment questions). Here, of course, the Act does not limit any rights protected by the speech and press clauses. To the contrary, the Act affirmatively protects the free speech rights of students.

the "need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement," and that § 4(e) was therefore "appropriate legislation" within the meaning of section five of the Fourteenth Amendment. 384 U.S. at 658.

Whether Congressional action is authorized by the Fourteenth Amendment is, of course, quintessentially a question of constitutional law. Nevertheless, the Court emphasized that "[i]t was for Congress . . . to assess and weigh" the underlying legislative facts—"the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . ." *Id.* at 653. *See also id.* at 668 (Harlan, J., dissenting) ("[t]o the extent 'legislative facts' are relevant to a judicial determination, Congress is well equipped to investigate them, and such determinations are of course entitled to respect").

The Court has accorded similar weight to Congressional findings under the Commerce Clause. In *Katzenbach* v. *McClung*, 379 U.S. 294 (1964), the Court upheld the constitutionality, under the Commerce Clause, of Title II of the Civil Rights Act of 1964. In doing so, the Court did not undertake its own independent evaluation of whether a local restaurant's refusal to serve blacks affected interstate commerce—the threshold constitutional question. Instead, the Court deferred largely to Congress's finding.

> Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory

> scheme necessary to the protection of commerce, our investigation is at an end.

379 U.S. at 303-304.

And in *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305 (1985), the Court upheld, under the Due Process Clause, a ten-dollar ceiling on attorneys' fee awards for veterans claiming certain benefits from the Veterans Administration. The Court noted that the Senate had previously found that VA claim procedures were quite informal and generally did not require an attorney's assistance and that the ten-dollar ceiling was adequate. In *Walters*, as in the present case, Congress's findings coincided with those of the district court, and this Court therefore did not have to "determine what deference must be afforded" them. 473 U.S. at 30 n.12. Nevertheless, the Court stressed that

> [w]hen Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.

Ibid. See also Rostker, *supra* (upholding, under Due Process Clause, Congressional decision to require men, but not women, to register for the draft); *Vance* v. *Bradley*, 440 U.S. 93, 111 (1979) (in equal protection case, "those challenging the legislative judgment must convince the Court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true").

Indeed, this Court has accorded great weight even to state legislative findings underlying constitutional issues. In *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), the Court upheld a state statute that established a new time limit for when certain mineral rights would be considered abandoned. Texaco argued that a two-year grace period provided in the statute gave insufficient notice of such a drastic change in the law, and thus violated the Due Process Clause. Whether a statute affords sufficient notice is inescapably a question of constitutional law. *See Lambert* v. *California*, 355 U.S. 225 (1957). Nevertheless, the *Texaco* Court stressed that it "shows the greatest deference to the judgment of state legislatures" on the question whether a given statute provides adequate notice of a change in the law. 454 U.S. at 532. Such deference is appropriate, the Court explained, because "[a] legislative body is in a far better position than a court to form a correct judgment" of the underlying legislative facts, such as "the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice." *Ibid. See also Brotherhood of Locomotive Firemen & Engineers* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138-39 (1968) ("The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion.").

II. THERE IS NO REASON NOT TO ACCORD SUCH WEIGHT TO CONGRESS'S FINDING THAT HIGH SCHOOL STUDENTS CAN DISTINGUISH BETWEEN STUDENTS' RELIGIOUS SPEECH AND STATE-SPONSORED RELIGION

In the present case, Congress found that "students below the college level are capable of distinguishing between State-initiated, school-sponsored, or teacher-led, religious speech on the one hand and student-initiated, student-led religious speech on the other," S. Rep. No. 357, *supra*, at 35. That factual determination was no less within the competence of a legislature than the legislative determinations to which this Court gave great weight in *Texaco*, *Morgan* and *McClung*—whether citizens were given adequate notice of a change in the law (*Texaco*), whether literacy tests in voting were related to discrimination in

day-to-day governmental services (*Morgan*), and whether racial discrimination in local restaurants had an effect on interstate commerce (*McClung*). Accordingly, Congress's findings in this case should be accorded similar weight. And since there is no evidence that that finding was at all improper, it should be accepted by this Court.

A. Both Lower Courts Agreed With Congress's Finding.

The district court, "[u]nder the facts of this case," specifically rejected the argument "that high school students, as compared with college students . . . are more impressionable and more susceptible to believing that the school approves and promotes the religious activity" of some of its students. Pet. App. B at 11 n.1. The Eighth Circuit expressly "accept[ed] Congress's fact-finding" to the same effect. Pet. App. A at 20. The court of appeals also, however, noted its own independent agreement with Congress's finding. It held that "even if Congress had never passed the EAA, our decision would be the same under *Widmar* alone." *Ibid.* It thus resolved the question, left open in *Widmar*, whether high school students are too "impressionable" for the same rule to apply to them. 454 U.S. at 274 n.14. And it also noted and rejected the Ninth Circuit's contrary view that high school students' "impressionability," among other things, distinguished them from university students. *Id.* at 20, n.3.[4]

B. Congress's Finding Was Made With Due Deliberation.

The Congress's finding that high school students are capable of distinguishing between state-sponsored, and student-initiated religious speech was an express "exercise of [the Senate Committee's] fact-finding powers,"

[4] Under this Court's "two court rule" the lower courts' factual findings might thus be dispositive in their own right. *But see Bose, Corp.* v. *Consumers Union of the United States*, 466 U.S. 485 (1984).

made only after it held extensive hearings, received much evidence, and heard the testimony of many witnesses, including several high school students. S. Rep. No. 357, *supra*, at 10. For example, Professor Tribe testified that *Widmar* should protect high school students' religious speech. *Id.* at 8. *See also* Religious Speech Protection Act: Hearing on H.R. 4996 Before the Subcomm. on Elem. Sec. and Voc. Educ. of the House Comm. on Educ. and Labor, 98th Cong., 2d Sess. 45 (1984) (statement of Prof. Laurence H. Tribe). Professor Tribe added that he had "no doubt that Congress has the constitutional authority—and may even have a real . . . constitutional duty—to withhold federally appropriated funds" from school districts that discriminate against students' religious speech, *Ibid.*

A broad spectrum of individual supporters of the legislation agreed. For example, Rep. Roukema, who is a former high school teacher and school board member, disputed the notion that "allowing religious groups to meet in the school under any circumstances will have the effect of advancing religion because of the impressionability of high school students." To the contrary, she noted that "studies of adolescent psychology * * * have shown that it is a time of increased cognitive capacity, marked by an ability of the adolescent to differentiate himself from authority figures . . . ." 130 Cong. Rec. 20,396 (1984). *See also id.* at 19,238-39 (remarks of Sen. Durenberger); *id.* at 19,239-40 (remarks by Sen. Biden).[5]

[5] There is ample support for Congress's conclusion in the psychological literature. One survey of such literature, which was cited by the Senate Committee, concluded "[g]iven the increased cognitive capacity and the psychological separation between the self and authority figures that occurs during adolescence, high school may in fact be a time when the distinction between tolerance based on mutual respect and explicit approval of student expression is particularly clear—even more clear, perhaps, than in later stages of life." Note, *The Constitutional Dimensions of Student-Initiated*

C. Both The Text Of The Act And Its Legislative History Demonstrate That Congress's Purposes Were Proper.

Both the text and the legislative history of the Equal Access Act demonstrate that in passing that Act, Congress was concerned only with vindicating students' rights, not with secretly establishing a religion. On its face, the Act protects not only religious speech, but also speech with "political, philosophical, or other content . . . ." 20 U.S.C. § 4071(a) (Supp. V 1987). And in practice, the Equal Access Act has been successfully invoked by non-religious student groups. *See Student Coalition for Peace* v. *Lower Merion School District Bd. of Directors*, 633 F. Supp. 1040 (E.D. Pa. 1986) (ordering school to permit use of gymnasium by student group promoting nuclear freeze).

This Court has frequently noted that a broad and facially neutral class of beneficiaries of a given statute dispels any notion that it constitutes an establishment of religion, even if a majority of those who choose to take advantage of the statute are religiously affiliated. The Court has stressed that it is "loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Mueller* v. *Allen*, 463 U.S. 388, 401 (1983). *See also Witters* v. *Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in the judgment and concurring in part) (where tuition assistance is available for study at a variety of schools, any resulting "aid to religion . . . is the result of [a student's] private choice. No reasonable observer is likely to draw . . . an inference that the State itself is endorsing a religious practice or belief."); *Widmar*, 454 U.S. at 274 (state

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Religious Activity in Public High Schools, 92 Yale L.J. 499, 509 (1983) (citing psychological studies), cited in S. Rep. No. 357, *supra*, at 35.

forum "available to a broad class of nonreligious as well as religious speakers" does not "confer any imprimatur of state approval" on religious speech).

The legislative history of the Act is likewise clear. Congress passed the Equal Access Act not to establish a religion, but to "resolve the dilemma" many school administrators perceived in trying to reconcile the free speech and religious liberty guarantees of the First Amendment. S. Rep. No. 357, *supra*, at 3, 21. The Congress found that "many school administrators across the country are prohibiting voluntary, student-initiated religious speech as an extracurricular activity." S. Rep. No. 357, 98th Cong., 2d Sess. 6 (1984). These prohibitions, Congress found, were rooted in school administrators' "erroneous[] belie[f] that the establishment clause prohibits students from engaging in [religious] speech at all, even when other types of extracurricular student speech are permitted." S. Rep. No. 357, *supra*, at 6. As the Senate Report noted, this situation was resulting in both a widespread restraint of student speech, *id.*, at 14-15, and the diversion of scarce resources to litigation. *Id.* at 21.

D. Congress's Finding Is Not In Conflict With This Court's Precedents.

Congress's finding does not conflict with any decisions of this Court. While the Court has said that high school students are in general somewhat more "impressionable" than college students, it has never said that they are so impressionable that they must (or, indeed, constitutionally may) be hermetically sealed off from all aspects of religion. Quite the contrary, the Court has affirmatively left room for religion in public schools.

In striking down Alabama's moment of silence statute, the Court was careful to stress that a State's "intent to return prayer to the public schools is, of course, quite different from merely *protecting every student's right to engage in voluntary prayer* during an appropriate mo-

ment of silence *during the school day.*" *Wallace* v. *Jaffree*, 472 U.S. 38, 59 (1985) (emphasis added). Similarly, in *Bender* v. *Williamsport Area School District*, 475 U.S. 534 (1986), the four Justices who reached the merits would have held that the establishment clause permitted (and the free speech clause required) public schools to allow student-led Bible studies on the same basis as other extracurricular groups. Justice Powell, the author of *Widmar*, wrote, "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." 475 U.S. at 556 (Powell, J., dissenting). And three other Justices stressed that "utterly unproven, subjective impressions of some hypothetical students should not be allowed to transform individual expression of religious belief into state advancement of religion." *Id.* at 553 (Burger, C.J., dissenting) (joined by White and Rehnquist, J.J.) (emphasis omitted).

The Court was likewise confident that the "released time" program approved in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), would not constitute an improper endorsement of religion. In *Zorach*, the Court upheld programs for releasing students, who were otherwise subject to compulsory attendance laws, from public schools for the sole purpose of attending religious instruction. The Court rejected a claim that such programs were necessarily coercive, noting that a "student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any." 343 U.S. at 311. "[T]he school authorities are neutral * * * and do no more than release students whose parents so request." *Ibid.*

By contrast, where the Court has sought to protect students' impressionability has been in formal classroom activities. Thus, the Court has prohibited public school teachers from affirmatively leading classroom prayer or Bible reading, *Jaffree, supra; School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203 (1963); *Engel* v. *Vitale*, 370 U.S. 421 (1962), from posting copies of the Ten Commandments, *Stone* v. *Graham*, 449 U.S. 39 (1980) (*per curiam*), or from teaching religious dogma themselves or in concert with visiting teachers, *Edwards* v. *Aguillard*, 482 U.S. 578 (1987); *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).[6] The Court has also been exceedingly cautious about the use of state-supplied teachers or materials in religiously affiliated schools. *See, e.g., Aguilar v. Felton*, 473 U.S. 402 (1985); *Meek* v. *Pittenger*, 421 U.S. 349 (1975); *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). But none of these cases is properly at issue here. Congress found only that high school students are mature enough to be able to distinguish the *extracurricular* religious speech of fellow students from religious coercion by the state. It did not address—one way or the other—whether high school students differ significantly from college students for purposes of formal classroom activities.

E. Congress's Finding Makes Good Sense.

Finally, Congress's finding accords with common sense. For better or worse, high school students must face a far more complex school environment than that which existed even twenty years ago. It is simply unrealistic to assume that they will view all of the various—and conflicting—behaviors and ideas tolerated in public schools as being endorsed by the State. As one high school student testified before Congress: "They also have a smoking section in our school. Does that mean that the school sanctions, supports and encourages smoking? I doubt it, just because the school allows a group to meet, doesn't mean it approves of and supports their activities.

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[6] Even so, however, the Court has presumed that courses in the history of religion or in the Bible as literature may be taught in public schools without fear that students will misperceive their purpose. *School Dist. of Abington Twp.* v. *Schempp*, 374 U.S. 203, 225 (1963).

The same should hold for religious groups." *Equal Access—A First Amendment Question: Hearings on S. 815 and S. 1059 Before the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 64 (1983)* (testimony of Sarah Scanlon). *See also id.* at 60 (testimony of Bonnie Bailey); *ibid.* (testimony of Lisa Bender); Equal Access Act: Hearings on H.R. 2732 Before the Subcomm. on Elem., Sec. and Voc. Educ. of the House Comm. on Educ. and Labor, 98th Cong., 1st Sess. 39 (1983) (testimony of C. Luke Thornton, Principal of John I. Leonard High School, Lake Worth, Fla.).

If high school students do manifest a particular susceptibility to others' ideas, it is generally not to the views of authority figures, but rather to those of their peers. And the establishment clause surely cannot require government to do the impossible—to insulate students from the ideas of their peers. Indeed, to the extent the state attempts to forbid students' private speech, it violates both the free speech clause and the free exercise clause. *See Tinker* v. *DesMoines Independent School Dist.*, 391 U.S. 503 (1969) (student's right to wear black armband protected under speech clause); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (students' refusal to salute flag due to religious convictions protected under the First Amendment).[7]

Finally, even if some high school students would view affording equal access to student religious clubs as endorsement of religion, at least as many, if not more, would surely construe forbidding such meetings as official hostility to religion. And that, of course, is also prohibited by the establishment clause. In fact, the Senate Committee found that "students reasonably perceive the

[7] *See also* Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499 (1983); Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135 (1983).

denial of access for religious speech as State hostility toward religion," S. Rep. No. 357, *supra*, at 36, and stressed that "its findings" were supported "by the testimony of the students themselves." *Id.* at 11, 19-20.

In sum, there is no factual, legal, or logical basis for questioning Congress's finding, and it should therefore be embraced by the Court.

CONCLUSION

The Equal Access Act does not establish a religion. It does nothing more than guarantee that students' extracurricular speech will not be censored for its political, religious or philosophical content. Moreover, as the Congress and both lower courts found, there is no constitutionally significant difference between high school and college students for purposes of the rule announced in *Widmar* v. *Vincent*. Accordingly, the Eighth Circuit's judgment should be affirmed.

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IN THE

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF CAMPUS CRUSADE FOR CHRIST, INC., AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus Curiae 1

Statement of the Case 2

Summary of Argument 4

Argument 5

I. THE EQUAL ACCESS ACT DOES NOT UNCONSTITUTIONALLY ESTABLISH RELIGION BECAUSE IT APPLIES ONLY TO STUDENT INITIATED CLUBS 5

A. School Sponsorship Of Student Clubs 7

B. Respondents' Request For School Recognition 10

C. Applicability Of The EAA To Student Clubs 11

D. Guidelines For Statutory Construction 14

II. A STUDENT INITIATED CLUB MAY BE PRESUMED TO BE NONCURRICULUM RELATED FOR PURPOSES OF THE EQUAL ACCESS ACT 15

A. The Right To Determine Relatedness 15

B. Relatedness Is A Function Of Initiation . . . 17

C. Some Clubs At WHS Are Student Initiated 19

Conclusion 21

TABLE OF AUTHORITIES

Cases	Pages
Chippewa Indians of Minn. v. U.S., 301 U.S. 358, rehearing denied 302 U.S. 772 (1937)	14
Engel v. Vitale, 370 U.S. 421 (1962)	13
Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982)	13
Mergens v. Bd. of Ed. of the Westside Community Schools, No. CV 85-0-426, slip op. (D.Neb. Feb. 2, 1988)	4, 8, 17
Mergens v. Bd. of Ed. of the Westside Community Schools, 867 F.2d 1076 (8th Cir. 1989) .	4, 11, 20
Miller v. U.S., 78 U.S. (11 Wall.) 268 (1870)	14
School District of Abington Township v. Schempp, 374 U.S. 203 (1963)	13
Statutes and Constitutional Provisions	
First Amendment	2
20 U.S.C. §§4071-4074 (The Equal Access Act)	*passim.*
Other Authorities	
School Board Policy No. 5610	7, 8, 9, 20
Brief of Appellees before the United States Court of Appeals for the Eighth Circuit.	8, 10

No. 88-1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF EDUCATION OF
WESTSIDE COMMUNITY SCHOOLS, et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF CAMPUS CRUSADE FOR CHRIST, INC., AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is an inter-denominational, non-sectarian religious organization, the primary purpose of which is to take the Christian message to the people of America and

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[1]Counsel of record to the parties in this case have consented to the filing of this brief and a joint letter of consent has been filed with the Clerk pursuant to Rule 36.

the world. Campus Crusade for Christ, Inc. was founded on the college campuses of America, and a key emphasis since its inception has been to minister to students. In addition to its campus ministry to colleges and universities, Campus Crusade for Christ, Inc. maintains a Student Venture ministry, directed solely to high school students, affecting public secondary school campuses nationwide.

In most instances, ministry to high school students is accomplished with the assistance of student Bible study groups, both on and off campus. That is why *Amicus Curiae* believes that this case, with issues relating to the power of public secondary school officials to regulate student Bible study groups on high school campuses, is of significant concern and importance to our constitutional jurisprudence.

Amicus Curiae seeks to defend the rights of religious liberty on behalf of its own members, the public high school students of America, and all of the people. Campus Crusade for Christ, Inc. and its members are engaged in the exercise of religious rights on the state university and public secondary school campuses of America on a daily basis. Challenges to the free exercise of religious freedom by student groups are often encountered by *Amicus Curiae*, and almost always in the context of the denial of access by school officials. Campus Crusade for Christ, Inc. believes the expertise of its counsel will be of assistance to the Court in this case.

STATEMENT OF THE CASE

This case involves the question of whether public high school officials can prevent a student initiated religious club

from having equal access to school facilities compared to other student initiated clubs.

Students of Westside High School (WHS) may become members of various student groups and clubs, all of which meet after school hours on school grounds. The students may choose from about thirty clubs, each of which has a faculty sponsor. Until appellees requested permission in 1985 to form a religious club known as the Christian Bible Study, no student club had ever been denied access to the school.

The request of appellees was denied on the basis that, in the view of school officials, allowing such a student club would violate the Establishment Clause of the First Amendment.[2] According to school officials, only student clubs which are school initiated and curriculum related are permitted to use school facilities. In essence, the position of appellants is that no student clubs at WHS are actually student initiated or noncurriculum related.

Respondents, however, wanted to form a student initiated club which would be neither school sponsored nor curriculum related. Respondents contend that many of the student clubs at WHS are actually student initiated and noncurriculum related. Accordingly, the Equal Access Act[3] guarantees the right of appellees to form the Christian Bible Study club at WHS.

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[2]The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .."

[3]20 U.S.C. §§4071-4074 (the EAA).

The District Court held for the appellants on the basis that "WHS need not permit its facilities to be used by a school sanctioned Christian Club."[4] The Court of Appeals, Eighth Circuit, reversed in favor of appellees, holding that "[m]any of the student clubs at WHS . . . are non-curriculum related."[5]

SUMMARY OF ARGUMENT

There is no real conflict between the EAA and the provisions of the First Amendment. Petitioners' conclusion that a student religious club at WHS would violate the Establishment Clause is based upon several false premises. For example, appellants wrongly assume that appellees requested permission to form a school sponsored student club rather than a student sponsored club. Petitioners also incorrectly interpret the EAA as being applicable to a school sponsored student club.

However, appellees attempted to form a club which would be student sponsored. It is student sponsored clubs with which the EAA is concerned, not school sponsored clubs. Consequently, the EAA cannot violate the First Amendment since it applies only to student sponsored clubs. Student sponsored clubs involve no substantive participation by government employees, so there is no state action connected with such clubs. Only a school sponsored club can violate the Establishment Clause because only

[4]*Mergens v. Bd. of Ed. of the Westside Community Schools*, No. CV 85-0-426, slip op. (D.Neb. Feb. 2, 1988) at 15.

[5]*Mergens v. Bd. of Ed. of the Westside Community Schools*, 867 F.2d 1076 (8th Cir. 1989) at 1079.

school sponsored clubs involve state action.

Petitioners also contend that school officials can decide whether student groups are curriculum related for purposes of the EAA, and that all student groups at WHS are school initiated. Again, both of these contentions are wrong.

Amicus Curiae suggests that the Court should presume any student sponsored club to be noncurriculum related under the EAA. Further, it is extremely unlikely that all student clubs at WHS are school initiated. Otherwise, there would have been no need for a procedure by which students could initiate a student club. Consequently, a limited open forum exists at WHS, and the EAA guarantees the right of appellees to form a student religious club at the school.

Accordingly, this Court should either uphold the constitutionality of the EAA or decide that the validity of the EAA is not at issue. In addition, this Court should affirm the right of public secondary students to have equal access to conduct student initiated religious meetings, and affirm the decision below in favor of appellees.

ARGUMENT

I. THE EQUAL ACCESS ACT APPLIES ONLY TO STUDENT INITIATED CLUBS AND DOES NOT UNCONSTITUTIONALLY ESTABLISH RELIGION.

It is a sign of the times when people believe that the free expression of religious ideas by individuals cannot be allowed in the public schools. Such notions would seem

strange to the founders of our nation who, in the Declaration of Independence, staked everything upon the existence of unalienable rights granted by *their Creator*, and based their liberty upon the "*laws of Nature and of Nature's God*."

Such hostility toward religious speech would also shock the Congress which enacted the Northwest Ordinance in 1787, Article III of which provided that: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged." The direct implication is that schools and religion are allies, not enemies.

In the first question presented to this Court, appellants have asked whether the EAA unconstitutionally establishes religion, if in fact the EAA requires a public high school to officially sponsor a student religious club. Petitioners have argued that to the extent the EAA compels the creation of a school sponsored religious club, the EAA is contrary to the Establishment Clause.

In presenting the question of the constitutionality of the EAA, Petitioners have made three crucial assumptions: 1) school policy requires all student clubs to be school sponsored; 2) appellees requested permission to form a school sponsored club; and 3) the provisions of the EAA apply to student clubs which are school sponsored. However, each of these three assumptions are erroneous, as the following analysis will demonstrate.

A. School Sponsorship Of Student Clubs.

There are two senses in which a student club may be considered school sponsored. In a broad sense, any student club is sponsored when school officials recognize the existence of the club for the purpose of according it the same rights and privileges as other clubs. In a narrow sense, a student club is sponsored only when school officials define, create and control the organization and operations of the club. Petitioners refer to a school sponsored club exclusively in this narrow sense.

Student clubs at WHS are governed by School Board Policy No. 5610, which states, among other things, that "School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship."[6] However, the policy also

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[6]The text of School Board Policy No. 5610 reads in its entirety as follows:

> The Board of Education regards student clubs and organizations as a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills.
>
> School-sponsored clubs, and organizations are those directly under the control of the school administration, and shall have faculty sponsorship. The Superintendent shall establish operational guidelines for clubs and organizations which shall function for the welfare and the best interest of the students and the school.
>
> Such clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief.

refers to non-school sponsored clubs, including "out of school clubs or organizations."

Petitioners view this policy very restrictively, though, and assume there are no non-school sponsored clubs at WHS, but only school sponsored clubs in the narrow sense. At trial, appellants argued that Policy No. 5610 demonstrates clubs must be under the direct control of the school administration, they must have a faculty sponsor, and all such clubs are curriculum related.[7] Upon appeal, appellants stated that

> School district policy requires that all clubs have a faculty sponsor and the school district initiates, supervises, directs and coordinates the activities of all the clubs at the high school.[8]

Consequently, as appellants have interpreted Policy No. 5610, all student clubs at WHS are not only school sponsored in the narrow sense, but they are also *school initiated*. As appellants see it, school initiated clubs are the only kind of student clubs which exist at WHS.

It is easy to understand how appellants might conclude that if the EAA requires the school to officially sponsor a student religious club in the narrow sense, such

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Students participating in out of school clubs or organizations may not identify the clubs as school-affiliated organizations without prior administrative approval.

[7]*Supra*, note 4, at 11.

[8]Summary and Request for Oral Argument, Brief of Appellees before the United States Court of Appeals for the Eighth Circuit.

requirement would involve state employees in religious activities contrary to accepted establishment principles.

Yet, there is a problem with this interpretation of Policy No. 5610. The policy clearly refers to three kinds of student clubs, not just one, each of which is covered by a separate paragraph of the policy.

The opening paragraph of the policy refers to all student clubs in general. The next paragraph describes school sponsored, that is, school initiated clubs. The third paragraph refers to "such clubs," meaning all student clubs, not merely school sponsored clubs, which are sponsored by persons other than school officials. This part of the policy does not prohibit all non-school sponsored clubs, but only those clubs sponsored by political, religious, or certain discriminatory organizations. This paragraph of the policy would make little sense unless it were possible for non-political, etc. outside groups to sponsor a student club, in which case the club would *not* be school sponsored.

In fact, several student clubs are sponsored by non-school groups: Interact is sponsored by Rotary International; Zonta is sponsored by Zonta International; and Subsurfers is sponsored by a private scuba diving business (the faculty "sponsor" essentially serves as a classroom custodian). Finally, the fourth paragraph of the policy refers to "out of school clubs" which may, with administrative approval, be recognized as school affiliated even though they are not school sponsored.

Contrary to appellants' contention, Policy No. 5610 does not require all student clubs at WHS to be school sponsored or school initiated. Petitioners' interpretation is

neither in keeping with the plain text of the policy, nor in keeping with the obvious facts. To claim that all student clubs at WHS are school sponsored or school initiated is erroneous.

B. Respondents' Request For School Recognition.

Petitioners have also misconstrued appellees' request for permission to form a Christian Bible Study club as a request for school sponsorship. As the District Court stated,

> the proposed club would have been identical in its formation, rights, privileges, and obligations to all other WHS clubs with but one exception, no faculty sponsor was proposed unless required.

Further, appellants have claimed the lack of a faculty sponsor to be the fatal flaw in appellees' request:

> The Bible Club or Christian Fellowship Club requested by Bridget Mergens was to be officially endorsed or approved by the school district and was to be identical in its formation rights, privileges, terms and conditions as other Westside High School affiliated student clubs, except that it would not have a faculty sponsor.[9]

Yet, appellees did not petition school officials at WHS for the purpose of having such officials sponsor the Christian Bible Study club. Rather, appellees were the initiators and creators of the club. What they sought from

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[9]*Id.*

school officials was mere recognition, for equal access purposes, in the same sense other non-school sponsored student clubs sought and received recognition at WHS.

In fact, the student club proposed to be formed by appellees was never intended to have a faculty sponsor. Rather, as the court below determined,

> Petitioners stressed to the Board that they were not requesting a faculty sponsor unless required by school policy. If one were required, appellants asserted that the faculty sponsor would only be needed for custodial purposes.[10]

In other words, it was the intention of appellees to form a student initiated and non-school sponsored club at WHS. In essence, appellants denied appellees' request because the club did not conform to the criteria for a school sponsored club. What appellants failed to do was to accord appellees the same right to form a student initiated non-school sponsored club as had been granted to other non-school sponsored clubs.

Thus, for appellants to claim that appellees' request either was, or should have been, a request for school sponsorship of a student religious club is erroneous.

C. Applicability Of The EAA To Student Clubs.

Petitioners' claim that the EAA violates the Establishment Clause springs directly from their assumption that the EAA applies to school sponsored student clubs.

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[10]*Supra,* note 5, at 1077.

However, the provisions of the EAA were not intended to apply to student clubs which are school sponsored in the narrow sense. This is evident from the opening paragraph of the EAA, which requires equal access for any "*students* who wish to conduct a meeting."[11]

For purposes of the EAA, student clubs are presumed to be student initiated *as opposed to* being school sponsored or initiated. If a club is school initiated, it would not fit into the classification of "*students* who wish to conduct a meeting." Consequently, the EAA does not apply to school sponsored student meetings.

Although not necessarily applicable to all cases arising under the EAA, the fair opportunity provisions of the EAA provide further guidance. This safe harbor applies only to meetings which are "voluntary and student-initiated . . . [and] there is no sponsorship of the meeting by the school, the government, or its agents or employees." Thus, what is presumed for all purposes under the EAA is made explicit for safe harbor purposes.

The exclusion of school sponsored student clubs from the scope of the EAA generally would seem to be a necessary result. Otherwise, the EAA would need to apply to "any *school* that wishes to conduct a meeting." Yet, the EAA recognizes the right of students to meet, not the rights of schools or school officials to conduct student meetings.

For this reason, the EAA can never run afoul of the Establishment Clause. Since a student initiated or non-

[11]20 U.S.C. §4071(a) (emphasis added).

school sponsored meeting involves no state action, there can be no violation of the Establishment Clause, because no public official or employee has become entangled with religious activities. If the scope of the EAA is limited to non-school sponsored meetings, no public official is compelled to do what the Constitution forbids.

Similarly, a student initiated club can never violate the Establishment Clause. As appellants have argued, a school sponsored student club is one which is school initiated. Accordingly, a non-school sponsored club must be student initiated. By definition, a student initiated club can never be school sponsored in the narrow sense. Thus, a student initiated club lacks any entanglement of government employees with religion. The presence of student initiated clubs may trigger the applicability of the EAA, but never the Establishment Clause.

This Court has considered many potential violations of the Establishment Clause over the years. Even without reviewing any specific cases at this point, it can be unequivocally stated that the Court has prohibited only state initiated, school sponsored or teacher led religious activity in the public schools, *not* student initiated or student led religious activity.[12] To regard the student initiated club proposed by appellees as violating the Establishment Clause would be unprecedented.

[12]*See, Engel v. Vitale*, 370 U.S. 421 (1962); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982).

D. Guidelines For Statutory Construction.

This Court has long recognized that a federal law should not be interpreted so as to imperil its constitutional validity where it is reasonably open to interpretation free from such peril.[13] Further, when a statute is reasonably capable of having two interpretations, one of which is clearly constitutional, and the other of which is of doubtful constitutionality, the former construction should be adopted.[14]

In this connection, the EAA is capable of two possible interpretations. The first, evidenced by its terms and the legislative history, is that the EAA applies only to student initiated clubs, not school sponsored clubs. Such an interpretation avoids any unconstitutional entanglements with religion under the Establishment Clause. Had appellants recognized the right of appellees to form a student initiated club on the same terms and conditions as other non-school sponsored clubs, the Establishment Clause would not now be at issue.

The second interpretation, advanced by appellants, is that the EAA applies to school initiated clubs. Under this interpretation, the constitutionality of which is doubtful, the EAA may be read as compelling public school officials to participate in religious activities as part of their official duties. However, this interpretation is without any merit.

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[13]*Chippewa Indians of Minn. v. U.S.*, 301 U.S. 358, rehearing denied 302 U.S. 772 (1937).

[14]*Miller v. U.S.*, 78 U.S. (11 Wall.) 268 (1870).

Accordingly, under the rule in *Miller v. U.S.*, the first interpretation should be adopted, and the EAA understood as not in violation of the Establishment Clause.

II. A STUDENT INITIATED CLUB MAY BE PRESUMED TO BE NONCURRICULUM RELATED FOR PURPOSES OF THE EQUAL ACCESS ACT.

In the second question presented to this Court, appellants have asked whether certain types of student clubs are necessarily noncurriculum related for purposes of the EAA. In essence, appellants are asking the Court to decide who has the right, as between school officials and students, to decide whether a public high school has a limited open forum or not. Petitioners have argued that it is the right of school officials to decide whether a limited open forum should exist.

However, appellants have again made three key assumptions which need to be examined: 1) if school officials can decide whether to have a limited open forum or not, then they can also determine whether student groups are curriculum related or not; 2) all school initiated clubs are, by definition, curriculum related; and 3) all student clubs at WHS are school initiated (i.e., a closed forum exists). Of these, the first and last are erroneous, and the second has significant implications which appellants have ignored.

A. The Right To Determine Relatedness.

At trial, appellants provided testimony to the effect that all student clubs at WHS are curriculum related for

purposes of the EAA, and that a limited open forum does not exist at WHS. Petitioners assumed they had the legal right to make both of these determinations. Although this assumption is consistent with appellants' contention that all student clubs at WHS are school initiated, it is nonetheless unwarranted. What appellants failed to realize is that the power to create a closed or limited open forum is separate from the power to decide whether a student group is curriculum related or not. This Court must not commit the same error.

School officials arguably can decide whether or not to allow a limited open forum to exist. The EAA, although requiring equal access to a limited open forum, does not require any public secondary school to *create* a limited open forum. Neither does the EAA, by defining when a limited open forum exists, preclude the possibility that a closed forum may exist if school officials so choose. What the EAA prohibits is the limitation or closing of a limited open forum *after* it has been created.

The areas of discretion and obligation with respect to a limited open forum are well defined. Whether a limited open forum exists is a question of law, at least in the sense that school officials cannot redefine what a limited open forum is. Yet, at the same time, the question of whether to create a limited open forum when one does not already exist is a matter entirely within the discretion of school officials. Thus, insofar as a limited open forum is concerned, school officials have discretion as to its *creation*, but legal obligation as to its *definition*.

Similarly, with respect to the matter of curriculum relatedness, there are areas of discretion and areas of legal

obligation. *Amicus Curiae* suggests that the definition of curriculum relatedness is a matter of legal obligation, not subject to the discretion of school officials. Further, whether to create a noncurriculum related club is within the discretion of students, not school officials.

Consequently, just as students have neither the right to alter the definition of a limited open forum nor to decide whether one should exist, so school officials have neither the right to define what curriculum relatedness is, nor to decide whether to create a noncurriculum related student club.

B. Relatedness Is A Function Of Initiation.

In essence, appellants maintain that all student clubs at WHS are not only *related* to curriculum, but are *part* of the curriculum. According to Dr. Findley, principal of WHS, the school's curriculum "includes required courses, elective courses, and clubs."[15] As appellants see them, the clubs each supposedly serve a curriculum related goal, are sponsored by school teachers, are controlled by the school board, and are in short, part of the WHS program.

Breaking this analysis down into its component parts, appellants contend that since all student clubs are school initiated, and all school initiated activities are part of the curriculum, then all student clubs must necessarily be curriculum related. Certainly, it makes sense that school initiated activities are curriculum related, or that they may at least be presumed to be curriculum related.

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[15]*Supra,* note 4, at 12.

Although *Amicus Curiae* does not concede that *all* school initiated clubs are necessarily curriculum related, there nonetheless is a presumption that such clubs are curriculum related. This presumption arises from the fact that the duties and powers of school officials extend no farther than the scope of the school's educational mission, i.e., the curricular program and activities. To the extent school officials initiate noncurricular activities, these should be insubstantial compared to the curriculum related activities.

Yet, appellants have failed to notice a significant implication of this reasoning, namely, if school initiated activities may be presumed to be curriculum related, then student initiated activities may be presumed to be noncurriculum related. Since it is not the right or duty of students to define or control the school curriculum, it is not within the power of students to initiate a curriculum related club.

School officials define, initiate and control the curriculum and program of the school, not students. Students participate in the curriculum and program of the school, but they neither sponsor it nor control it. The right of curriculum definition belongs exclusively to school officials.

If, as appellants suppose, all student clubs at WHS are school initiated and part of the school curriculum, then they must all be curriculum related. This situation would make WHS a closed forum, *if* the facts are as appellants see them. However, if in fact any student clubs at WHS were student initiated, then there is at least a limited open forum at WHS. Under the EAA, a limited open forum

exists if at least one student club is noncurriculum related,[16] and under the above analysis, a student club is noncurriculum related if it is student initiated.

In short, *Amicus Curiae* suggests that whether a student club is curriculum related is a function of initiation: school initiated clubs are curriculum related and student initiated clubs are noncurriculum related. Of course, it is possible for any school, as does WHS, to simultaneously have some student clubs which are curriculum related and some which are not. There is no presumption under the EAA that the student clubs in any one school must either be all curriculum related or all noncurriculum related.

It is further suggested that school officials have no power to impose school sponsorship on a student initiated group. Otherwise, the EAA would become meaningless. If school officials had the right to change the legal character of a group not initiated by their own actions, it would subvert the students' rights of free speech, free exercise of religion, and free assembly all in one fell swoop.

C. Some Clubs At WHS Are Student Initiated.

If it can be shown that any one of the thirty student clubs at WHS was not school initiated, then a limited open forum exists as a matter of law. Thus, *Amicus Curiae* asks this Court to find that not all student clubs at WHS are school initiated.

There is ample evidence that at least one of the student clubs at WHS was not school initiated. For example,

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[16] 20 U.S.C. §4071(b).

although there was no formal written procedure for the formation of student clubs and organizations, appellants did recognize a *de facto* procedure for student club creation.

According to the court below, students wishing to form a club would normally present their goals and objectives to a school official who analyzes the proposed group's goals and objectives and decides whether or not the group fit into School Board Policy No. 5610.[17] In fact, this was the procedure followed by appellees, who first presented their proposal for a Christian Bible Study club to the principal of WHS.

Obviously, appellees were not the first group of students to have utilized this *de facto* procedure. Respondents were merely following the procedure previously established and used by other student groups. The only difference was that appellees were the first group of students whose request was denied.

Further, as discussed earlier, a number of student clubs are sponsored either by outside organizations or by students wishing to be affiliated with such organizations. Is it to be seriously maintained that Subsurfers, a scuba diving club, in which an outside organization issues diving certificates (presumably by someone who is so licensed), is school initiated and part of the school curriculum? Clearly, Subsurfers is neither school sponsored nor curriculum related.

Consequently, to the extent the Court finds that any one of the thirty existing student clubs at WHS was student

[17] *Supra,* note 5, at 1077.

initiated, rather than school initiated, such club carries the presumption that it is noncurriculum related for EAA purposes. Accordingly, such a finding requires the conclusion that there exists a limited open forum at WHS, rather than a closed forum.

CONCLUSION

Amicus Curiae calls upon this Court to make the fundamental distinction between *state action* in the establishment of a particular religion, on the one hand, and the *actions of individuals* in exercising their religious rights, where the government has done nothing more than secure these rights by statute, on the other hand.

Under this analysis, the EAA cannot reasonably be construed as unlawfully establishing religion. The EAA merely recognizes and secures the equal rights of *individual students* to engage in religious speech when there is a limited open forum. It reasonably applies only to *student* initiated, *student* led clubs, not clubs which are formed and controlled by public schools. Contrary to Petitioners' assertions, the EAA does not require school officials to sponsor, control, or otherwise participate in any student religious activities. It simply requires them to let students form and participate in such voluntary clubs, including clubs where religious ideas will be discussed.

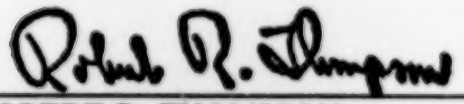
The EAA enhances the freedom of expression of all students without any coercion regarding religion. Therefore, under the facts of this case and sound principles of statutory construction, no conflict whatsoever can be found between the EAA and the Establishment Clause, and the constitutionality of the EAA should be strongly upheld.

Furthermore, to prevent it from being rendered meaningless, the EAA should be construed so as to prevent schools from arbitrarily defeating its protective provisions. Where a limited open forum exists, schools cannot be permitted to impose "state sponsorship" upon a student initiated club. Since it is student initiated clubs which are protected by the EAA, students have the right to define the nature of their club.

Indeed, student initiated clubs may be presumed to be noncurriculum related by virtue of fact that they are *student*, and not *school*, initiated. Thus, in a limited open forum school officials cannot be permitted to annex a student initiated club into the public school curriculum without the consent of the students. Nor can school officials impose "curriculum relatedness" on a student initiated club, and unilaterally defeat the students' rights which are protected under the EAA.

Respondents seek merely to form a voluntary student club in which ideas with religious content and religious significance will be spoken and expressed. As a matter of law, they should not be discriminated against and excluded by school officials from school forums. Since the record clearly reflects that student initiated clubs were permitted at the school, a limited public forum existed as a matter of law and the Equal Access Act, therefore, applies to protect the Respondents' right to form a student initiated religious club.

Respectfully submitted,



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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CHRISTIAN ADVOCATES SERVING EVANGELISM IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

ARGUMENT 3

I. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT REQUIRE THAT CURRICULUM RELATEDNESS BE DETERMINED BY AN OBJECTIVE TEST RATHER THAN BY AN IMPOSSIBLE-TO-MEET AND ARBITRARY SUBJECTIVE TEST OF SCHOOL OFFICIAL INTENT 3

A. Regardless of School Officials' Subjective Intent, Groups that Are Not Directly Related to the School Curriculum and that Are Not Truly Sponsored by the School Are Noncurriculum Related Groups under the Act 3

1. The Act by Its Terms Establishes an Objective Definition of "Noncurriculum Related Student Groups." 3

2. The Legislative History of the Act Confirms the Objective Definition of "Noncurriculum Related Student Groups." .. 4

a. The Senate Debates 4

b. The House Debates 6

3. School Officials May Not Circumvent the Act Simply by Declaring that All Nonreligious Student Groups Are Curriculum Related 8

B. This Court Uses an Objective Standard in Evaluating State Action Burdening First Amendment Rights 11

TABLE OF CONTENTS – Continued

Page

1. This Court Condemns Arbitrary, Discretionary, or Subjective Standards for Official Action Affecting Religious and Other Expression as a Prior Restraint 11

2. This Court Also Measures Curriculum Relatedness by an Objective Standard Rather than by Subjective Intent 14

C. The Court of Appeals Correctly Held that the Forum at Westside High School Was Not Limited to Curriculum Related Groups (Properly Defined) 15

II. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT REQUIRE THAT WHETHER A FORUM HAS BEEN OPENED BE DETERMINED BY THE SCHOOL'S POLICY AND PRACTICE RATHER THAN BY THE SUBJECTIVE INTENT OF SCHOOL OFFICIALS 16

A. The Hazelwood Decision and Other Decisions, and the First Amendment, Do Not Allow a School District To Exclude Expression Based on a Subjective Intent To Avoid a Limited Forum While Having a Policy or Practice that Opens a Limited Forum 17

1. Hazelwood Employed an Objective Standard for School Forums 17

2. Widmar and Perry Employed an Objective Standard for Limited Open Forums 18

TABLE OF CONTENTS – Continued

Page

B. The Act Is Intended To Be Consistent with the First Amendment Standard for Determining that a Forum Is Opened .. 19

C. The Court of Appeals Correctly Held that Westside High School Has Opened a Forum and that the Forum Must Be Open to the Bible Club 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

Board of Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. ___, 96 L. Ed. 2d 500 (1987) 13

Cantwell v. Connecticut, 310 U.S. 296 (1940) 11

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. ___, 100 L. Ed. 2d 771 (1988) 12

Cornelius v. NAACP Legal Defense & Education Fund, Inc., 473 U.S. 788 (1985) 18

Fowler v. Rhode Island, 345 U.S. 67 (1953) 10

Hague v. C.I.O., 307 U.S. 496 (1939) 11

Hazelwood School District v. Kuhlmeier, 484 U.S. ___, 98 L.Ed.2d 592 (1988) 6, 14, 15, 17

Healy v. James, 408 U.S. 169 (1972) 8

Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981) 13

Kunz v. New York, 340 U.S. 290 (1951) 11, 12

Largent v. Texas, 318 U.S. 418 (1943) 11

Lewis v. City of New Orleans, 415 U.S. 130 (1974) 13

Lovell v. Griffin, 303 U.S. 444 (1938) 11

Madison School District v. Wisconsin Employment Relations Comm'n, 429 U.S. 167 (1976) 17

Mergens v. Board of Education, No. CV 85-0-426 (D. Neb. Feb. 2, 1988) 14, 16, 20

Mergens v. Board of Education, 867 F.2d 1076 (8th Cir. 1989) 11, 19

Niemotko v. Maryland, 340 U.S. 268 (1951) 11, 12, 14

TABLE OF AUTHORITIES – Continued

Page

Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983) 15, 17, 18

Saia v. New York, 334 U.S. 558 (1948) 11

Schneider v. New Jersey, 308 U.S. 147 (1939) 11

Widmar v. Vincent, 454 U.S. 263 (1981) 18, 19, 20, 22

STATUTES AND LEGISLATIVE HISTORY:

20 U.S.C. § 4071 3

20 U.S.C. § 4072 8

130 Cong. Rec. H12270 (daily ed. October 11, 1984) (statement of Rep. Bonker) 4, 9

130 Cong. Rec. H12271 (daily ed. October 11, 1984) (statement of Rep. Bonker) 9

130 Cong. Rec. H12273 (daily ed. October 11, 1984) (statement of Rep. Goodling) 9

130 Cong. Rec. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling) 6, 15

130 Cong. Rec. H7667 (daily ed. July 25, 1984) (statement of Rep. Perkins) 19

130 Cong. Rec. S8358 (daily ed. June 27, 1984) (statement of Sen. Biden) 19

130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Dixon) 19

130 Cong. Rec. S8362 (daily ed. June 27, 1984) (statement of Sen. Dole) 3, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND LEGISLATIVE HISTORY:

130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton) 16, 20

130 Cong. Rec. S8332 (daily ed. June 27, 1984) (statement of Sen. Hatch) 19

130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Hatfield) 4

130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield) 19

130 Cong. Rec. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy) 21

130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin) 20

130 Cong. Rec. S8364 (daily ed. June 27, 1984) (statement of Sen. Thurmond) 19

H. Rep. No. 710, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 2348 19

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S. 1059, 98th Cong., 1st Sess. (1983) 4, 5

U.S. CONSTITUTION:

U.S. Const. amend. I ..... 2, *passim*

OTHER AUTHORITIES:

Note, Religious Expression in the Public School Forum: The High School Student's Right to Free Speech, 72 Geo. L.J. 135 (1983) 8

Trial Transcript (Tr.) 16, 22

No. 88-1597

In The

Supreme Court of the United States

October Term, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,

Petitioners,

v.

BRIDGET MERGENS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF CHRISTIAN ADVOCATES SERVING EVANGELISM IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS IN THIS CASE*

This case presents important issues concerning the freedom of speech for all Americans. The American tradition of free and open discourse in public places has

*Counsel of Record to the parties in this case have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.

contributed greatly to the success of our democracy. Christian Advocates Serving Evangelism (CASE) is opposed to Petitioners' attempt to restrict religious speech in a public high school's limited open forum that is generally accessible to nonreligious student groups. CASE believes that the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed and that this Court should issue its opinion in favor of Respondents' First Amendment rights.

CASE is a Christian ministry dedicated to protecting, preserving, and defending First Amendment rights to proclaim the Gospel of Jesus Christ in public places. As one of its tenets, CASE seeks to strengthen the individual citizen's respect for, and allegiance to, our constitutional form of government. CASE undertakes to assist litigants throughout the United States in significant cases relating to First Amendment freedoms, and CASE lawyers have specialized in litigation in both state and federal courts with regard to various First Amendment issues. CASE believes the experience of its counsel will be of assistance to the Court in this case.

ARGUMENT

I. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT REQUIRE THAT CURRICULUM RELATEDNESS BE DETERMINED BY AN OBJECTIVE TEST RATHER THAN BY AN IMPOSSIBLE-TO-MEET AND ARBITRARY SUBJECTIVE TEST OF SCHOOL OFFICIAL INTENT.

A. Regardless of School Officials' Subjective Intent, Groups that are Not Directly Related to the School Curriculum and that Are Not Truly Sponsored by the School Are Noncurriculum Related Groups under the Act.

1. The Act by Its Terms Establishes an Objective Definition of "Noncurriculum Related Student Groups."

A school establishes a limited open forum, and thereby brings itself within the coverage of the Equal Access Act, when it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The Act defines "meeting" to include student activities *"not directly related to the school curriculum." Id.* § 4072(3). *See also* 130 Cong. Rec. S8362 (daily ed. June 27, 1984) (statement of Sen. Dole) ("the bill's definition of 'limited open forum' . . . encompass[es] only those student group meetings that are not directly related to the school's curriculum"). Thus, the Act defines "noncurriculum related student groups" not according to the subjective intent of school officials but according to the

directness of the relationship between the groups' activities and the school's academic or instructional curriculum.

Further clarification of the meaning of "noncurriculum related" and "not directly related to the school curriculum" may be found in the legislative history of the Act.[1]

2. The Legislative History of the Act Confirms the Objective Definition of "Noncurriculum Related Student Groups."

Throughout the floor debates on the Act in both houses of Congress, "noncurriculum related student groups" were identified by their lack of direct relationship to the school's instructional curriculum and by their lack of school sponsorship. They were not identified according to the subjective opinion of school officials.

a. The Senate Debates

On the Senate floor, Senator Hatfield, a principal sponsor of the Act, was asked to clarify the meaning of

[1] The direct legislative history of the "noncurriculum related" language is confined to the floor debates in the Senate and House of Representatives. No committee reported on the final version of the bill containing the "noncurriculum related" language because the final version was introduced on the Senate floor as a perfecting amendment to a previous version of the Act, S. 1059, and on the House floor as an amendment to the Emergency Math/Science Education Act. 130 Cong. Rec. S8338 (daily ed. June 27, 1984) (statement of Sen. Hatfield); *id.* H12270 (daily ed. Oct. 11, 1984) (statement of Rep. Bonker).

"limited open forum" and "noncurriculum related." 130 Cong. Rec. at S8342 (daily ed. June 27, 1984) (statement of Sen. Gorton). Sen. Hatfield stated that a limited open forum is created when "the school permits legitimate activities *outside of the instructional activities of the school,*" and that an activity is "noncurriculum related" when it is not "a kind of *extension of the classroom.*" *Id.* (emphasis added). Foreign language clubs, for example, are extensions of existing foreign language classes, and are therefore not noncurriculum related. *Id.* However, "the chess club, the Young Democrats, the Young Republicans, and various and sundry other such clubs would certainly not be in the curriculum-related category." *Id.* Interscholastic athletic programs such as high school football teams are curriculum related because they grow out of the physical education curriculum, are supported directly by tax dollars, and are led by faculty members hired specifically for that purpose. *Id.*[2] The same is true of cheerleading squads, some drama clubs, and school bands. *Id.*

In short, "one of the keys to the noncurriculum-related student organization is that it is not *sponsored* by the school." *Id.* (statement of Sen. Gorton) (emphasis added). "Sponsorship" in this context "has to do with *official participation,* . . . the *directing* of that activity, and the *leading* of that activity, and the *orchestrating* of that activity." *Id.* (statement of Sen. Hatfield) (emphasis added). As the Act itself provides, " 'sponsorship'

[2] A previous version of the Act specifically excluded "any officially sponsored school athletic team that participates in interscholastic competition" from its definition of "voluntary extracurricular activities. S. 1059, 98th Cong., 1st Sess. (1983).

includes the act of promoting, leading, or participating in a meeting." 20 U.S.C. § 4072(3). *See also Hazelwood School District v. Kuhlmeier*, 484 U.S. ___, 98 L. Ed. 2d 592, 605 (1988) (defining school sponsorship).

Thus, the Equal Access Act is triggered by the existence of student organizations on campus that are not sponsored by the school, *as the term sponsorship is objectively defined under the Act* (i.e., funded, participated in, led, directed, or orchestrated by the school). School officials may not circumvent the Act by *claiming* to sponsor student groups or by re-defining sponsorship more broadly than does the Act, as the school officials have attempted to do in this case. *See* Section I.C. *infra*.

b. The House Debates

The legislative history in the House of Representatives parallels that in the Senate. On the House floor, Representative Goodling (R.-Pennsylvania), also emphasized the objective sponsorship element in defining "noncurriculum related student groups." Rep. Goodling focused on whether public schools "usually . . . *sponsor*" the activity in question. 130 Cong. Rec. H7732 (daily ed. July 25, 1984) (emphasis added). Thus, "academic, athletic, or musical" activities such as "[a] Latin club, a soccer team, and a school band" all are clearly curriculum related under the Act. *Id*. However, echoing the distinctions drawn in the Senate, "[a] young Democrat or Republican club, private social organizations, or religious groups" are noncurriculum related under the Act. *Id*. If it is unclear whether the activity is one that public schools usually sponsor, the question becomes whether *"the school or a schoolteacher require[s] or directly encourage[s] student participation in such group in connection with curriculum course work." Id*. If so, the meeting would be considered curriculum related and the equal access policy would not be triggered. *Id*.

Thus, Congress broadly defined noncurriculum related student groups by narrowly defining curriculum-related activities. To summarize the provisions of the Act and its legislative history, the following are characteristics of *curriculum*-related activities which do not trigger the equal access concept:

(1) Most importantly, the activity is directly related to specific courses in the school, as language clubs are to language classes, science and mathematics clubs are to those classes, and a drama club is to a drama class.

(2) The activity is funded entirely or substantially by the school, including provision of a specially paid faculty sponsor, rather than the school simply providing a meeting room and necessary "overhead" expenses such as heat and light.

(3) The activity is organized by the school independent of student initiation.

(4) The activity officially represents the school to the community (e.g., interscholastic athletic teams, cheerleading squads, or some musical groups).

(5) Participation in the activity is "required or directly encouraged" in connection with

> curricular course work (e.g., foreign language clubs; speech and drama clubs in schools with forensics and drama classes).[3]

Because many of the student groups meeting at Westside High School do not satisfy any of the above criteria, they are noncurriculum related groups under the Act and the school has created a forum by allowing them to meet. *See* Section I.C. *infra*.

3. School Officials May Not Circumvent the Act Simply by Declaring that All Nonreligious Student Groups Are Curriculum Related.

The objective definition of noncurriculum related groups in the text of the Act, § 4072(3), and the elaboration upon that objective definition in the legislative history demonstrate that local school officials are not free to circumvent the Act simply by deeming all groups to be curriculum related or school-sponsored, heedless of those activities' actual relationship to the school's curricular course work. Congress clearly contemplated that the distinction between curriculum related and noncurriculum

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[3] A student group that objectively is noncurriculum-related cannot, in an attempt to evade the Equal Access Act, be transmogrified into a curriculum-related group by being redesigned to meet the second through fifth factors. Such "a subterfuge for content based discrimination against a student-initiated religious club" would be contrary to this Court's decision in *Healy v. James*, 408 U.S. 169, 181-83 (1972), prohibiting a university from refusing a campus organization official recognition when such refusal would severely hamper the ability of students to meet. Note, *Religious Expression in the Public School Forum: The High School Student's Right to Free Speech*, 72 Geo. L.J. 135, 144-45 (1983).

related activities was an objective distinction, to be made on the basis of the factors outlined above, and not on the basis of local officials' private, variable, and potentially overbroad conceptions of curriculum relatedness.[4] This is precisely the position stated in "The Equal Access Act Guidelines":

> [A] local school cannot defeat the intent of The Equal Access Act by some all encompassing definition that arbitrarily results in all but one or a few student clubs being defined as curriculum related.

130 Cong. Rec. H12271 (daily ed. October 11, 1984) (statement of Rep. Bonker).[5]

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[4] Senator Hatfield at one point in the floor debate disclaimed any intention to limit the discretion of school districts "to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related." 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statements of Sen. Gorton and Sen. Hatfield). He made it clear, however, that school districts could engage in such line drawing by their actions and not merely by playing word games. Thus, the school district could determine that a cheerleading squad should be curriculum related *by assigning a teacher to lead the squad. Id.* (statement of Sen. Hatfield).

[5] "The Equal Access Act Guidelines" were drafted jointly by numerous private groups that had participated, on both sides of the issue, in drafting and debating the Act. 130 Cong. Rec. H12270 (daily ed. October 11, 1984) (statement of Rep. Bonker). The Guidelines "are intended as an explanation and do not reflect the official position of the Congress or the U.S. Government." *Id.* at H12273 (statement of Rep. Goodling).

The semantic gymnastics adopted by the school officials in this case should be rejected, just as similar definitional gamesmanship was rejected in *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953). In *Fowler*, a city ordinance prohibited persons from addressing religious meetings in public parks. The city applied the ordinance against a Jehovah's Witness speaker who addressed a religious meeting in a public park, but conceded that it would not have applied the ordinance against a speaker at a Protestant church service in the same park. *Id.* at 69. This Court pointedly dismissed the city's argument that the Jehovah's Witness speaker's expression differed from that of a Protestant minister:

> To call the words which one minister speaks to his congregation a sermon, immune from regulation, and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another.

Id. at 70. Here, the school officials' description of the words one student group speaks as "curriculum related" and the words of another student group as "noncurriculum related" – without any objective distinction between the student groups in terms of school sponsorship or relation to the instructional curriculum – is an indirect way of excluding religious speech entirely.

A subjective, school-by-school interpretation of curriculum-relatedness would render the Act ineffectual, as the Court of Appeals held:

> Allowing such a broad interpretation of "curriculum-related" [as that advanced by the school officials] would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and

> choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. *A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.*

Mergens v. Board of Education, 867 F.2d 1076, 1078 (8th Cir. 1989) (emphasis added).

B. This Court Uses an Objective Standard in Evaluating State Action Burdening First Amendment Rights.

1. This Court Condemns Arbitrary, Discretionary, or Subjective Standards for Official Action Affecting Religious and Other Expression as a Prior Restraint.

It is well established that statutes and ordinances requiring that permits be obtained from local officials as a prerequisite to the use of public places "constitute[] a prior restraint on freedom of speech, press and religion, and, in the absence of *narrowly drawn, reasonable and definite standards* for the officials to follow, must be invalid." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (emphasis added), citing *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948); *Hague v. C.I.O.*, 307 U.S. 496 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938). *See also Largent v. Texas*, 318 U.S. 418 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Schneider v. New Jersey*, 308 U.S.

147 (1939). If the license-issuing practice lacks clear standards or allows arbitrary refusal to grant a license, it impermissibly gives "an administrative official discretionary power to control in advance the right of citizens to speak on religious matters." *Kunz*, 340 U.S. at 293. *See also Niemotko*, 340 U.S. at 273. Standard-less discretion also unconstitutionally hinders judicial review of governmental officials' decisions, as this Court recently stated in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. ___, 100 L. Ed. 2d 771 (1988):

> [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable, expression.

Id. at 783. *See also id.* at 792 ("Such a minimal requirement cannot provide the standards necessary to ensure constitutional decision-making, nor will it, of necessity, provide a solid foundation for eventual judicial review.")

Such arbitrary and standard-less powers cannot be justified as time, place, or manner restrictions. In the licensing situation, the "covert forms of discrimination that may result when arbitrary discretion is vested in some governmental authority . . . [are] inherently inconsistent with a valid time, place, and manner regulation

because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981).

The same is true when deciding whether a forum has been opened. School officials may not be permitted unfettered discretion to define at their arbitrary and subjective whim which forums are open or closed, or which student groups are or are not curriculum related. Otherwise, school officials would be free to engage in the covert forms of discrimination and suppression against which the First Amendment is meant to protect.

This Court has previously rejected a subjective forum-relatedness standard. In *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. ___, 96 L. Ed. 2d 500, 508 (1987), airport officials sought to enforce a ban on "expressive activity unrelated to airport-related purposes." This Court rejected the proposed subjective limitation:

> [T]he result of this vague limiting construction would be to give LAX officials alone the power to decide in the first instance whether a given activity is airport related. Such a law that "confers on police a virtually unrestrained power to arrest and charge persons with a violation" of the resolution is unconstitutional because "[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident."

Id. at 509, quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135-36 (1974) (Powell, J., concurring).

In this case, the school district argues that no forum had been opened because a school official "testified that, *in his opinion*, all clubs and activities at WHS are curriculum related." *Mergens v. Board of Education*, No. CV 85-0-426, slip op. at 12 (D. Neb. Feb. 2, 1988) (emphasis added). However, "the exercise of [the] freedoms of speech and religion protected by the First and Fourteenth Amendments, [have] a firmer foundation than the whims or personal opinions of a local governing body." *Niemotko*, 340 U.S. at 272.

2. This Court Also Measures Curriculum Relatedness by an Objective Standard Rather than by Subjective Intent.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. ___, 98 L. Ed. 2d 592 (1988), this Court distinguished curriculum-related student speech from noncurriculum-related student speech on the same basis as does the Equal Access Act. The Court focused on whether the activity in question was *"school-sponsored"* so that "students, parents, and members of the public might reasonably perceive [the activity] to bear the imprimatur of the school." 484 U.S. at ___, 98 L. Ed. 2d at 605 (emphasis added). Activities that are school sponsored and bear the school's imprimatur "may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id. Only* when student activities are "part of the school curriculum" by this definition have school officials " 'reserve[d] the forum for its intended purpos[e]' as a

supervised learning experience for . . . students" and not created a limited open forum. *Id.*, quoting *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 46 (1983).

The record in this case demonstrates that many of the student groups at Westside High School are noncurriculum related and not school-sponsored under this Court's definition of those terms in *Hazelwood*, as well under Congress' definition of those terms in the Equal Access Act.

C. The Court of Appeals Correctly Held that the Forum at Westside High School Was Not Limited to Curriculum Related Groups (Properly Defined).

Several of the student groups actively meeting at Westside High School clearly are "noncurriculum related student groups" as that term is objectively defined by the Equal Access Act: the groups are not objectively directly related to specific curricular courses, the meetings are not truly sponsored by the school, and participation in those groups is not required or directly encouraged as part of any curricular course work. In fact, several of the student groups fall within categories that Congress specifically intended to designate as noncurriculum related. Interact and Zonta are service clubs affiliated with Rotary International and are therefore "private social organizations" that are noncurriculum related under the Act. 130 Cong. Rec. H7732 (daily ed. July 25, 1984) (statement of Rep. Goodling). The Chess Club, which, contrary to the District Court's finding, is not an extension of the high school's "logic class" because no such class exists (Tr.

265:5-7), "would certainly not be in the curriculum-related category." 130 Cong. Rec. S8342 (daily ed. June 27, 1984) (statement of Sen. Hatfield). For Interact, Zonta, the Chess Club, the Ski Club, and the Subsurfers Club, among others, (i) the clubs are initiated by students, not by the school, (ii) attendance is completely voluntary, (iii) none is offered as a prerequisite for class credit or graduation, and (iv) the school's participation is limited to providing teachers merely to fulfill the role of a monitor. (Tr. 83:16-23; 140:20-141:1; 177:1-11; 176:12-19; 222:11-16; 269:21-23; 401:23-402:18). Neither the school officials' mere "opinion [that] all clubs and activities at WHS are curriculum related," *Mergens*, No. CV 85-0-426, slip op. at 12, nor their arbitrary designation of the groups as school-sponsored, in any way change the objective facts: the clubs are not sponsored by the school and participation is not required or encouraged as part of any curricular course work.

II. THE EQUAL ACCESS ACT AND THE FIRST AMENDMENT REQUIRE THAT WHETHER A FORUM HAS BEEN OPENED BE DETERMINED BY THE SCHOOL'S POLICY AND PRACTICE RATHER THAN BY THE SUBJECTIVE INTENT OF SCHOOL OFFICIALS.

This Court has never allowed the existence of a traditional public forum to hinge on the subjective intent of governmental officials about public use of streets and parks. It has never allowed the creation of an open forum to depend on the subjective and arbitrary decision of governmental officials about a group's requested access to other public property. The same approach should be

taken to the definition and creation of limited open forums in public schools.

A. The *Hazelwood* Decision and Other Decisions, and the First Amendment, Do Not Allow a School District To Exclude Expression Based on a Subjective Intent To Avoid a Limited Forum While Having a Policy or Practice that Opens a Limited Forum.

In concluding that Westside High School is a closed forum because of the school officials' "opinion" that all existing student groups were curriculum related, the District Court "ignore[d] the ancient wisdom that calling a thing by a name does not make it so." *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 174 (1976). This Court has never relied on government officials' expression of their subjective intent in determining whether a public forum has been created.

1. *Hazelwood* Employed an Objective Standard for School Forums.

Instead, the Court in *Hazelwood* focused on the relevant officials' *policy and practice:*

> Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations.

Hazelwood, 484 U.S.___, 98 L. Ed. 2d at 603, quoting *Perry*, 460 U.S. at 47. While "[t]he government does not create a

public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," *"the Court has looked to the policy and practice of the government to ascertain whether it intended* to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 802 (1985), citing *Perry*, 460 U.S. at 46.[6]

2. *Widmar* and *Perry* Employed an Objective Standard for Limited Open Forums.

School officials "intentionally open[] a nontraditional forum for public discourse" by students when they knowingly create an opportunity for or permit the discourse that is sufficient to create the forum. There is no requirement that the school officials specifically intend all possible results of their actions permitting the existence of the forum. For example, the school officials of the University of Missouri at Kansas City specifically intended *not* to permit religious student groups to meet on its campus, *Widmar v. Vincent*, 454 U.S. 263, 265 & n. 3 (1981), but had nonetheless created a public forum, from which religious student groups could not be excluded, by encouraging or allowing other student groups to meet. Similarly, the Court in *Perry* did not analyze evidence of

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[6] "The Court has also examined the nature of the property and its compatibility with expressive activity to discern the government's intent," *Cornelius*, 473 U.S. at 802, citing *Widmar v. Vincent*, 454 U.S. 263 (1981). Here, as in *Widmar*, the property in question is compatible with the proposed expressive activity.

the school officials' subjective intent regarding the schools' internal mail system but instead looked to their *actions*, describing designated forums as "public property which the State *has opened* for use by the public as a place for expressive activity." 460 U.S. at 45.

Here, the school officials affirmatively encouraged the formation of clubs that were student-initiated and noncurriculum related, thereby opening a forum with much more than the minimum necessary permission. Their subjective intention to exclude religious student groups from the forum they had created is irrelevant to the fact of the forum's existence.

B. The Act Is Intended To Be Consistent with the First Amendment Standard for Determining that a Forum Is Opened.

The oft-stated purpose of the Equal Access Act was to codify for public secondary schools this Court's holding in *Widmar v. Vincent*, 454 U.S. 263. *See* S. Rep. No. 357, 98th Cong., 2d Sess. 7-8, 23, 28-29 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, 2348, ___; H. Rep. No. 710, 98th Cong., 2d Sess. 3 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News, ___, ___; 130 Cong. Rec. S8332 (daily ed. June 27, 1984) (statement of Sen. Hatch); *id.* at S8338 (statement of Sen. Dixon); *id.* at S8342 (statement of Sen. Hatfield); *id.* at S8358 (statement of Sen. Biden); *id.* at S8364 (statement of Sen. Thurmond); 130 Cong. Rec. H7667 (daily ed. July 24, 1984) (statement of Rep. Perkins). Both the court of appeals and the district court in this case recognized that the purpose of the Act was to codify *Widmar. See Mergens*, 867 F.2d at 1079 & n. 1,

quoting 130 Cong. Rec. S8355 (daily ed. June 27, 1984) (statement of Sen. Levin); *id.* at 1080 ("The language of the EAA closely tracks the holding of the Court in *Widmar*"); *Mergens*, No. CV 85-0-426, slip op. at 7 n. 3 ("The Committee Report discusses *Widmar* at length, and the language of the statute tracks, at least generally, the holdings of *Widmar*, directing their application to public secondary schools").

Further, in defining a "limited open forum" for purposes of the Act, Congress specifically adopted the First Amendment standard for determining when a forum is opened:

> We have used the phraseology that has been used by the courts and educational institutions to circumscribe what would be called a limited forum. We have used the term "limited forum," borrowing that from the courts.

130 Cong. Rec. S8342 (daily ed. June 11, 1984) (statement of Sen. Hatfield).

There can be no question that the Act also incorporates from First Amendment law the insistence that "policy and practice" determine whether a forum has been opened, regardless of school officials' subjective intent. Senator Leahy addressed this point at length:

> It might have been possible under *earlier versions* of the bill to argue that a limited open forum resulted when a *school made a formal decision* to have a limited open forum, for example, by resolution of the school board. Or perhaps the decision might be not to have a limited open forum. Whatever the official decision of the school, the language of the earlier draft might have been interpreted to allow the school's actions to differ from their words. Take the case of a school that decided not to have a limited open forum, having adopted a formal resolution

> to that effect. Suppose that school then decided to consider any student group wanting to meet on school premises during noninstructional time on a case-by-case basis.
>
> Counsel to that school board might well argue that the board's resolution took the school outside the coverage of this bill, since the bill only applies to schools that have a limited open forum, and the resolution states that the school does not have a limited open forum. Since the bill would not apply to this school, the school could then turn around and allow only non-religious clubs or perhaps allow only religious clubs on school premises during noninstructional hours.
>
> The point is that *a limited open forum should be triggered by what a school does, not by what it says*. The careful wording of the current draft will protect both religious and secular interests because it speaks with clarity about what a limited open forum means.

130 Cong. Rec. S8341 (daily ed. June 27, 1984) (statement of Sen. Leahy) (emphasis added). Sen. Dole expressed the same view: the Act's definition of limited open forum "will preclude a school from *practicing* one policy toward the use of school facilities by student groups, while officially adopting another." *Id.* at S8362 (emphasis added).

While the school officials in this case may *say* that no forum has been created and that all student groups are school-sponsored and curriculum related, the objective *facts* demonstrate that many of the student groups are neither truly school-sponsored nor curriculum related. The school's *actions* are determinative under the Act, and this school district has created a limited open forum.

C. The Court of Appeals Correctly Held that Westside High School Has Opened a Forum and that the Forum Must be Open to the Bible Club.

In this case, school officials have by policy and practice opened the facilities of Westside High School for indiscriminate use by student groups, subject only to reasonable and nondiscriminatory time, place, and manner restrictions. Unlike the school newspaper at issue in *Hazelwood*, the forum in question here is not sponsored by the school, it is not "taught by a faculty member during regular class hours," and students do not receive grades or academic credit for their participation. *See* 484 U.S. at ___, 98 L. Ed. 2d at 603. Instead, (i) during noninstructional time, (ii) the school permits students to initiate organizations (Tr. 274:16-25; 288:2-5; 507:5-25; 514:17-20), (iii) with a wide variety of purposes, including community service (Interact, Zonta), business (Future Business Leaders of America), and recreation (Chess Club, Ski Club, Subsurfers Club), and (iv) provides faculty "sponsors" who fulfill the role merely of a monitor and not an instructor. (Tr. 401:23-402:18).

Thus, the forum at issue in this case is identical in every material respect to the forum in *Widmar*, and the school officials' exclusion of the Bible Club was patently improper. The subjective test that was the school officials' ground for excluding the Bible Club is as much a violation of the First Amendment as an overt discrimination between religious and nonreligious student groups, and is equally a violation of the Equal Access Act and its carefully tailored objective test for the existence of an open forum.

CONCLUSION

The Eighth Circuit correctly held that the forum at Westside High School included noncurriculum related groups under the Equal Access Act, that the school had therefore opened a limited open forum under the Act and the First Amendment, and that the forum must be open to the Bible Club on the same basis as other student organizations. Moreover, the Eighth Circuit properly construed the Equal Access Act to prescribe an objective test for the existence of a limited open forum and for curriculum-relatedness and school sponsorship, which is the standard required by the First Amendment under this Court's decisions eschewing arbitrary official discretion over expressive activities. CASE respectfully urges this Court to affirm the judgment of the U.S. Court of Appeals for the Eighth Circuit in this case.

Date: October 26, 1989

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IN THE

Supreme Court Of The United States

October Term, 1989

THE BOARD OF EDUCATION of the WESTSIDE COMMUNITY SCHOOLS (Dist. 66), et al.,
Petitioners,

v.

BRIDGET C. MERGENS, et al.,
Respondents.

On Writ of Certiorari To
The United States Court of Appeals
For the Eighth Circuit

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether public school officials violate the Free Exercise or Establishment Clauses of the First Amendment when they prohibit students from meeting on school property for voluntary, student-initiated religious discussions and Bible study on equal terms with other students.

2. Whether public school officials violate the Free Speech Clause of the First Amendment when they prohibit students from meeting on school property for voluntary, student-initiated religious discussions and Bible study on equal terms with other students.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Interest of Amicus Curiae 1

Summary of Argument 3

Argument 4

I. Public School Officials Violate the Free Exercise And Establishment Clauses Of The First Amendment When They Prohibit Students From Meeting On School Property For Voluntary, Student-Initiated Religious Discussions And Bible Study On Equal Terms With Other Students 5

A. This Court Has Forbidden Governmental Hostility Toward Religion 5

B. The School Officials' Conduct Amounted To Constitutionally Impermissible Hostility Toward Religion 10

II. Public School Officials Violate The Free Speech Clause Of The First Amendment When They Prohibit Students From Meeting On School Property For Voluntary, Student-Initiated Religious Discussions And Bible Study On Equal Terms With Other Students 14

A. Westside Officials Have Created A Limited Public Forum For Student Groups During Scheduled Club Periods 15

TABLE OF CONTENTS — (Continued)

Page

B. School Officials May Not Prove The Existence Of A Nonpublic Forum Merely By Articulating Its Boundaries After The Fact 18

C. Petitioners Have Not Shown A Compelling State Interest To Justify Singling Out Respondents For Exclusion From The Club Forum 21

D. Even If The Westside Club Program Were A Nonpublic Forum, Petitioners' Actions Would Be Constitutionally Prohibited Because They Amount To Discrimination Against Respondents' Viewpoint 23

Conclusion 25

TABLE OF AUTHORITIES

Cases: *Pages*

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 15

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986) 15, 20, 21

Bishop v. Aronov, et al., No. CV-88-G-1591-5 (N.D. Ala. September 21, 1988) 3

Board of Airport Commissioners v. Jews for Jesus, ___ U.S. ___, 107 S.Ct. 2568 (1987) 19

Board of Education v. Allen, 392 U.S. 236 (1968) 22

Board of Education v. Pico, 457 U.S. 853 (1982) 25

Brown v. Board of Education, 347 U.S. 483 (1953) 11

Cornelius v. NAACP Legal Defense and Educational Fund Inc., 473 U.S. 788 (1985) 15, 18, 24

County of Allegheny v. American Civil Liberties Union, ___ U.S. ___, 109 S.Ct. 3086 (1989) 6, 11, 14

Everson v. Board of Education, 330 U.S. 1 (1947) 11, 22

Hazelwood School District v. Kuhlmeier, ___ U.S. ___, 108 S.Ct. 562 (1988) ..... passim

Lemon v. Kurtzman, 403 U.S. 602 (1971) 6, 21

Lynch v. Donnelly, 465 U.S. 668 (1984) 6, 7, 13

McDaniel v. Paty, 435 U.S. 618 (1978) 6, 8, 9, 23

Mergens v. Board of Education, 867 F.2d 1076 (8th Cir. 1989) 4, 18

TABLE OF AUTHORITIES — (Continued)

Cases: *Pages*

Mergens v. Board of Education, slip op. (D. Neb. 1988) ..... passim

Mueller v. Allen, 463 U.S 388 (1983) 22

Papish v. Board of Curators, 410 U.S. 667 (1973) 21

School District of Abington Township v. Schempp, 374 U.S. 203 (1963) 8, 10, 13

Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) 19

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 14, 20, 21

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 9, 13

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) 25

Widmar v. Vincent, 454 U.S. 263 (1981) ..... passim

Witters v. Washington Dept. of Service for the Blind, 474 U.S. 481 (1986) 22

Zorach v. Clauson, 343 U.S. 306 (1952) 5, 6, 9, 11

Miscellaneous

A. Reichly, *Religion in American Public Life* 165 (1986) 13

Fish, *Liberalism Doesn't Exist,* 1987 Duke L.J. 997 13

Madison, *Memorial and Remonstrance Against Religious Assessements.* Reprinted in an appendix to *Everson v. Board of Education,* 330 U.S. 1 (1947) 11

TABLE OF AUTHORITIES — (Continued)

Miscellaneous: *Pages*

W. Moberly, *The Crisis in the University* 56 (1949) 13

McConnell, *Accommodation of Religion*, 1985 S.Ct. Rev. 1 10

A. Tocqueville, *Democracy in America*, 292 (Anchor Book Ed. 1969) 10

Williamsburg Charter, published by Williamsburg Charter Foundation (June 25, 1989) (available at Williamsburg Charter Foundation, Washington, D.C.) 8, 12, 25

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BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Amicus curiae, The Southern Center of Law & Ethics (the "Center") is a non-profit corporation founded in January 1985 and based in Birmingham, Alabama. Written consent of all parties to the Center's filing of this brief accompanies it.

The purpose of the Center is to develop and assist members of the legal and lay communities in understanding how to integrate a world and life philosophy with law and social ethics. Its geographic focus is principally the State of Alabama. Policies are set by a board of directors composed of four lawyers and two laymen. Activities are conducted by Executive Director J. Scott Houser, a well-known figure locally in public affairs. Houser's activities for the Center include public speaking, interaction with interested law students and members of the academic community, publication of articles, and identification and engagement of lawyers for participation in litigation on important public issues related to the Center's purposes.

The Equal Access Act, and the constitutional considerations inherent in the question of whether religious clubs may be treated differently from other high school clubs, is one of particular interest to the Center. Throughout the past several years the Center has participated in activities in an effort to encourage fair treatment of religion by state boards of education, school administrators, principals and teachers. The Center's director has reviewed numerous textbooks proposed for approval by the Alabama State Board of Education to ensure that religion was treated fairly both in the context of the role of religion in history and the contribution of religion to ethical development. The director has lectured to faculty members at several universities on fair treatment of religion in the classroom.

The Center's purpose through these activities, and through the filing of this Brief of Amicus Curiae, is not to establish any particular religious content within high school or college curriculums. It is, rather, to assist the fostering of fair treatment of religion and religious students in public education. The Center is therefore

interested in preserving the ability of religious student groups to utilize high school facilities on the same basis that is allowed to nonreligious student groups.

The outcome of this case is of particular interest to the Center because of its present involvement in litigation concerning the censorship by the University of Alabama of a professor's classroom and on-campus extra-curricular religious speech. *Bishop v. Aronov, et al.*, No. CV-88-G-1591-5 (N.D. Ala. September 21, 1988). While there may be differences between a university and a secondary school setting, and between student and faculty speech, the objectionable conduct in both cases is the exercise of discretion by school administrators in a manner hostile to religion.

SUMMARY OF ARGUMENT

Public school officials, as government representatives, are prohibited by the Free Speech, Free Exercise and Establishment Clauses of the First Amendment from denying students the right to meet on school property for voluntary, student-initiated religious discussions and Bible study on equal terms with other students.

The Free Exercise and Establishment Clauses of the First Amendment prohibit public school officials from discriminating against students on the basis of religion. The central value these clauses embody is religious liberty. Petitioners violated these provisions when they denied Respondents the benefit of meeting on school property on the same basis as other students. Their actions served to banish Respondents from the political community, thereby sending the message that students interested in learning about and practicing religion are outsiders. Such segregation on the basis of religion, like discrimination based on race, is constitutionally impermissible.

By allowing a wide variety of student-initiated clubs to meet on school property after school hours, Petitioners have created a public forum. Having created a public forum, they are prohibited by the Free Speech Clause of the First Amendment from denying Respondents the privilege of meeting on school grounds absent a compelling state interest. Petitioners have not shown a compelling state interest to justify singling out Respondents for exclusion from the club forum.

Even if the Westside club program were a nonpublic forum, Petitioners' actions would be constitutionally prohibited because they amount to discrimination against Respondents' viewpoint. Viewpoint discrimination is impermissible even in a nonpublic forum. While Petitioners avowedly encourage a multitude of viewpoints by allowing students to meet in a variety of groups after school, they selectively exclude a religious viewpoint from making an equal contribution. The First Amendment prohibits such discrimination.

ARGUMENT

Introductory Statement

The undisputed evidence in this case is that only one student group has ever been precluded from meeting on the property of Westside High School ("WHS") after school hours by the Westside school officials. *Mergens v. Board of Education,* 867 F.2d 1076, 1077 (8th Cir. 1989). This group, organized by the Respondents, sought to conduct religious discussions and Bible study. While the policy and practice of WHS is to allow students to form clubs and to meet after school, WHS abandoned this policy when Bridget Mergens and Andrea Simmonds requested permission to start a "Bible Club." WHS allowed a chess club, scuba diving club, and various

social clubs to meet; however, school officials turned down Respondents' request on the ground that permitting their proposed club to meet would violate the Establishment Clause. The sole ground, therefore, for denying Respondents' request was the religious content of their speech. In forbidding Respondents' group from meeting on an equal basis with other student-initiated groups, the WHS officials demonstrated constitutionally proscribed hostility toward religion.

I. PUBLIC SCHOOL OFFICIALS VIOLATE THE FREE EXERCISE AND ESTABLISHMENT CLAUSES OF THE FIRST AMENDMENT WHEN THEY PROHIBIT STUDENTS FROM MEETING ON SCHOOL PROPERTY FOR VOLUNTARY, STUDENT-INITIATED RELIGIOUS DISCUSSIONS AND BIBLE STUDY ON EQUAL TERMS WITH OTHER STUDENTS.

A. This Court Has Forbidden Governmental Hostility Toward Religion.

This Court has repeatedly made clear that the First Amendment religion clauses preclude the government from discriminating against citizens because they desire to exercise religious liberty. In *Zorach v. Clauson,* 343 U.S. 306 (1952), in which a time-release program for religious training away from public school property was upheld, the Court discussed the impermissibility of governmental hostility toward religion. Dismissing the idea that government may not accommodate the "spiritual needs" of the citizenry, *id.* at 314, the Court declared:

> To hold that [government] may not [accommodate religion] would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.

> That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups, nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Id. at 314. This view was reiterated in *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984), where the Court declared that the Constitution "forbids hostility" toward any religion.

While it is clear that governmental hostility toward religion is constitutionally impermissible, the Court has not been uniform in stating *why* this is so. Several opinions suggest that such hostility violates the Establishment Clause. In *Lemon v. Kurtzman,* 403 U.S. 602, 613 (1971), the Court held that the Establishment Clause precludes the government from acting so as to "inhibit religion." A similar view was expressed in *McDaniel v. Paty,* 435 U.S. 618 (1978), where the Court unanimously struck down a section of the Tennessee Constitution which prohibited clergy members from serving as state legislators. Justice Brennan wrote in concurrence that the provision violated the Establishment Clause because it manifested "patent hostility toward, not neutrality respecting, religion . . . and, in sum, has a primary effect which inhibits religion." *Id.* at 636.

Justice O'Connor has expressed the view that governmental hostility toward religion violates the Establishment Clause because of the "message" of exclusion sent to those discriminated against. *Lynch v. Donnelly,* 465 U.S. at 688. (O'Connor, J., concurring). In *County of*

Allegheny v. American Civil Liberties Union, Justice O'Connor stated:

> [T]he Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." The government violates this prohibition if it endorses or disapproves of religion. "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

___ U.S. ___, ___, 109 S.Ct. 3086, 3118 (1989) (O'Connor, J., concurring) *quoting Lynch v. Donnelly,* 465 U.S. at 688 (1984) (O'Connor, J., concurring) (citations omitted). Government hostility toward religion, by definition, makes religion relevant to standing in the political community.

The obvious difficulty with the view that the government violates the Establishment Clause when it demonstrates hostility toward religion is that such hostility does not serve to *establish* religion. At most, it establishes irreligion. Since the text of the Establishment Clause does not explicitly forbid the government from discriminating against religion, it is not self-evident that government hostility toward religion is unconstitutional.

Several Justices have suggested that because the central value of the First Amendment Religion Clauses is religious liberty, governmental hostility toward religion is constitutionally impermissible. As Justice Goldberg has observed:

> The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment, foreclose not only laws "respecting an

establishment of religion" but also those "prohibiting the free exercise thereof." These two proscriptions are to be read together, and in light of the single end which they are designed to serve. This basic purpose of the religion clauses of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief.

School District of Abington v. Schempp, 374 U.S. 203, 306 (Goldberg, J., joined by Harlan, J., concurring.)[1]

The *Williamsburg Charter*[2] also makes clear that both the Establishment Clause and the Free Exercise Clause are designed to facilitate religious liberty. This document, whose signers include, *inter alia,* Chief Justice Rehnquist, former Chief Justice Burger, and former presidents Carter and Ford, represents the culmination of an effort to achieve a national consensus on the importance and meaning of the Religion Clauses of the First Amendment. The *Charter* declares that:

> [T]he two clauses are essentially one provision for preserving religious liberty. Both parts, No establishment and Free exercise, are to be

[1]Justice Brennan expressed a similar view: "[T]he Court's decisions have indicated that the limits of permissible governmental action with respect to religion under the Establishment Clause must reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." *Paty,* 435 U.S. at 638.

[2]Published by Williamsburg Charter Foundation (June 25, 1989) (available at Williamsburg Charter Foundation, Washington, D.C.).

> comprehensively understood as being in the service of religious liberty as a positive good. . . . [A]ll faiths are free to enter vigorously into public life and to exercise such influence as their followers and ideas engender. Such democratic exercise of influence is in the best tradition of American voluntarism and is not an unwarranted "imposition" or "establishment."

Id. at pp. 16-17.

The religious heritage of the American people also dictates that government not be hostile to religion. In *Zorach,* the Court noted that:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

343 U.S. at 313-14. Justice Brennan has written that when the government shows hostility toward religion it is "at war with our national tradition as embodied in the First Amendment's guaranty of free exercise of religion." *Paty,* 435 U.S. at 639.[3]

[3]Similarly, in *Walz,* where tax exemptions for religious property were validated, the Court declared that few concepts are

> more deeply embodied in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

Walz v. Tax Comm'n, 397 U.S. 664, 676-77 (1970).

Hostility toward religion robs American democratic institutions of a major source of the values which inform them. The American political tradition presupposes a government which does not seek to shape its people's values, but rather is itself shaped by them. Accordingly, religion has traditionally played a central role in the development of public virtue.[4] For this reason, Tocqueville described religion as "the first of [America's] political institutions."[5] Thus, governmental hostility toward religion is antithetical to the American experience:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . .

Abington School District v. Schempp, 374 U.S. 203, 306 (Goldberg, J., concurring, joined by Harlan, J.).

B. The School Officials' Conduct Amounted To Constitutionally Impermissible Hostility Toward Religion.

Whether one appeals to the Establishment Clause, the "central value" of the First Amendment, or the nation's religious heritage, the school officials' decision to exclude the Respondents' group on the ground that it was intended for religious discussion and practice amounted to constitutionally impermissible hostility toward religion. Regarding the Establishment Clause concerns, the Respondents were certainly sent "a message . . . that they are outsiders, not full members of the

[4]McConnell, *Accommodation of Religion,* 1985 S.Ct. Rev. 1, 18.
[5]A. Tocqueville, *Democracy in America* 292 (Anchor Book Ed. 1969).

political community." *County of Allegheny,* ___ U.S. at ___, 109 S.Ct. at 3119 (O'Connor, J., concurring). Moreover, the students were subjected to "unique disabilities" simply because they desired to learn about and practice religion. The primary effect of this action was certainly to inhibit religion.

With regard to the nation's religious heritage, the school officials' decision was manifestly at odds with an historical "attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach,* 353 U.S. at 313. Indeed, the school officials' conduct revealed the opposite attitude. It demonstrated an intention to banish the Respondents from the public community, thereby degrading them "from the equal rank of citizens"[6] allowed to communicate and express themselves with public approval.

Banishing students from the public school grounds on the basis of their desire to discuss and practice religion sends not only the message that they are outside the acceptable community, but that they are inferior to it as well. In denominating the Respondents' group as unacceptable to meet on school property, the school authorities treated the Respondents in a manner analogous to the school children in *Brown v. Board of Education,* 347 U.S. 483 (1953). In *Brown* the Court stated:

> [S]egregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro race.

[6]Madison, *Memorial and Remonstrance Against Religious Assessments,* Reprinted in an appendix to *Everson v. Board of Education,* 330 U.S. 1, 64 (1947).

347 U.S. at 494. Religion forms a central part of the identity of the committed believer. Discriminating against religious students with "the sanction of law" by not allowing them to meet on equal terms with other students surely sends the message that they are inferior outsiders.

The School Board's actions in this case are symptomatic of a fundamental misconception that religion has no part in American public life. Concerning such actions the *Williamsburg Charter* declares:

> Too often in recent disputes over religion and public affairs, some have insisted that any evidence of religious influence on public policy represents an establishment of religion and is therefore precluded as an improper "imposition." Such exclusion of religion from public life is historically unwarranted, philosophically inconsistent and profoundly undemocratic. The Framers' intention is indisputably ignored when public policy debates can appeal to the theses of Adam Smith and Karl Marx, or Charles Darwin and Sigmund Freud but not to the Western religious tradition in general and the Hebrew and Christian Scriptures in particular. Many of the most dynamic social movements in American history, including that of civil rights, were legitimately inspired and shaped by religious motivation. Freedom of conscience and the right to influence public policy on the basis of religiously informed ideas are inseverably linked. In short, a key to democratic renewal is the fullest possible participation in the most open possible debate.

Williamsburg Charter, at 21.[7]

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[7]One commentator has observed:

> Society that excludes religion totally from its public life, that seems to regard religion as something against which public life must be protected, is bound to foster the impression that religion is either irrelevant or harmful.

A. Reichly, *Religion in American Public Life* 165 (1986). *See also*, Fish, *Liberalism Doesn't Exist*, 1987 Duke L.J. 997, 1000.

The Petitioners cannot justify their actions by claiming that they demonstrated "neutrality" toward religion. Strict neutrality toward religion sometimes amounts to great hostility. Neutrality toward religion, when it results in exclusion thereof, teaches that religion is of secondary importance. It teaches this is not a way that invites debate, but in a fashion where it is accepted silently, but all the more insidiously.[8] The exclusion of religious activities under the guise of "neutrality" manifests, in effect, an official repudiation of religious activity. As Justice Goldberg observed in *Abington*:

> [U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

374 U.S. at 306 (Goldberg, J., concurring, joined by Harlan, J.).[9]

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[8]W. Moberly, *The Crisis in the University* 56 (1949).

[9]The necessity that the government encourage religious liberty, rather than act with indifferent neutrality, is augmented due to the fact that the public sector is ever-expanding. As Justice Kennedy noted:

> Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. *Lynch v. Donnelly, supra*, 465 U.S. at 678, 104 S.Ct. at 1361; *Walz v. Tax Comm'n, supra*, 397 U.S. at 669, 90 S.Ct. at 1411. Any approach less sensitive to our heritage would border on latent hostility toward religion, as it would require government in all its multifaceted roles to

Petitioners' "devotion to the secular," evidenced by their decision to exclude the religious, amounted to affirmative hostility toward religion. It served to discriminate against Respondents on a constitutionally impermissible basis. For this reason, the decision of the Court of Appeals should be affirmed.

II. PUBLIC SCHOOL OFFICIALS VIOLATE THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT WHEN THEY PROHIBIT STUDENTS FROM MEETING ON SCHOOL PROPERTY FOR VOLUNTARY, STUDENT-INITIATED RELIGIOUS DISCUSSIONS AND BIBLE STUDY ON EQUAL TERMS WITH OTHER STUDENTS.

The school officials' violation of Respondents' free speech rights provides an additional basis on which to affirm the Court of Appeals. The extent to which educational officials may exercise discretion in regulating speech protected by the First Amendment is a question which this Court has considered on more than one occasion. Although "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), school officials may regulate student speech in many

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acknowledge only the secular, to the exclusion and so to the detriment of the religious. A categorical approach would install federal courts as jealous guardians of an absolute "wall of separation," sending a clear message of disapproval. In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality.

County of Allegheny, ___ U.S. at ___, 109 S.Ct. at 3135.

respects in the interest of ensuring the fulfillment of the school's educational mission. Thus, school officials may censor student publications in order to protect the privacy rights of other students, *Hazelwood School District v. Kuhlmeier*, ___ U.S. ___, 108 S.Ct. 562 (1988), and they may punish students for offensive speech during school assembly programs, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). However, cases such as *Hazelwood* and *Fraser* do not provide a carte blanche for school officials to suppress speech they dislike. The Constitution does not permit school officials to suppress religious speech on state property without adequate, and, in this case, compelling, justification.

A. Westside Officials Have Created A Limited Public Forum For Student Groups During Scheduled Club Periods.

The constitutional limitations applicable to the Westside officials are set forth in *Widmar v. Vincent*, 454 U.S. 263 (1981). The Court's now familiar holding in *Widmar* is that where a University has made its meeting rooms generally available to registered student organizations, it has thereby created a "limited public forum,"[10] thus requiring school officials to justify any content-based speech regulation by showing a compelling state interest. *Id.* at 267.

The similarity of this case to *Widmar* is too apparent to be seriously questioned.[11] Just as in *Widmar*, where

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[10]A "limited" or "created" public forum is one "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 802 (1985).

[11]*Bender v. Williamsport Area School District*, 475 U.S. 534, 555-56 (1986) (Powell, J., dissenting) ("The only arguable distinction between *Widmar* and this case is that *Widmar* involved University students while the groups here are composed of high school students. . . . I do not believe —

the University permitted "registered student organizations" to use University facilities for meetings, 454 U.S. at 265, so here, "WHS students are allowed to become members of various student groups and clubs, all of which meet after school hours on school grounds," *Mergens*, 867 F.2d at 1077. In *Widmar*, University policy was to "routinely provide[] University facilities for the meetings of registered organizations." 454 U.S. at 265. Westside officials likewise placed no significant restrictions on club formation:

> There is no written school policy concerning the formation of clubs. Rather, students wishing to form a club present their goals and objectives to a school official who analyzes the stated goals and whether or not the proposed club is consistent with Board Policy 5610. Until [Respondents] attempted to form a Christian Bible Study Club in January 1985, no club had ever been denied access to the school.

Mergens, 867 F.2d at 1077.[12]

In seeking reversal of the Eighth Circuit's opinion below, Petitioners make the unpersuasive argument that their closure of the Westside club forum to religious speech is justified on the basis that religious speech is unrelated to Westside's curriculum. In furtherance of

particularly in this age of massive media information — that the few years difference in age between high school and college students justifies departing from *Widmar*.").

[12]In fact, School Board Policy 5610, reproduced in *Mergens v. Board of Education*, (D. Neb. 1988), slip op. at 10, provides almost no basis upon which a school official could decide whether the formation of a student-initiated club is permissible. Aside from prohibiting club sponsorship by outside political, religious or discriminatory organizations, the policy merely affirms the role of such clubs in "developing citizenship, wholesome attitudes, good human relations, knowledge and skills" and states that such clubs "are directly under control of the school administration." It is thus difficult to account for the district court's statement that the facts in *Bender* and *Widmar* "differ markedly from the policy in force at WHS," *id.* at 10, n. 4.

this argument, Petitioners assert that Board Policy 5610 limits clubs to those which are "curriculum-related." *Mergens*, slip op. at 11. Applications of this "standard" of curriculum-relatedness are justified by articulated "connections" between the school curriculum and the student clubs. *Id.*[13]

The Court below rightly held that the students' constitutional rights could not hang on such a slender thread. It concluded that reliance on petitioners' "curriculum-related" standard vested impermissible discretion in school authorities to rationalize content-based suppression of speech after the fact:

> Allowing such a broad interpretation of "curriculum-related" would make the [Equal Access Act] meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administra-

[13]The court summarized Petitioners' testimony concerning the "connections" between the permitted clubs and school curriculum as follows:

> Dr. Findley and Dr. Tangdall ... explained that Interact, a service club which is peripherally connected to Rotary International, is related to sociology and psychology, and that participation can result in a better grade for a student; chess club provides an arena for logical thinking, and is, therefore, an extension of a WHS logic class; Subserfers, it is urged, is related to the goals of the physical education department; the National Honor Society is related to all courses and is an honor and not, technically, a club; photography club is really a class which is related to the art department; Welcome to Westside likewise is not a club but a matching of new students with older students in an effort to provide a better educational ambience; Future Business Leaders of American fosters the development of business skills and is related to WHS business and economics courses; Zonta is the female counterpart to Interact; and Student Advisory Board and Student Forum are generally related to democracy, citizenship, and, indirectly, to the classes on government.

Slip op. at 11-12.

> tion could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content. . . . A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Mergens, 867 F.2d at 1078. This Court should adopt the Eighth Circuit's conclusion that Respondents' exclusion from the forum cannot be justified on the basis of a determination by petitioners that the club was not curriculum-related. To hold otherwise would serve to vest school officials with the discretion to exclude any speech they deem undesirable.

B. School Officials May Not Prove The Existence Of A Nonpublic Forum Merely By Articulating Its Boundaries After The Fact.

This Court has never permitted public officials to justify a policy that property is not open for expressive activity merely by articulating the "boundaries" of the forum after the fact. A finding that a forum is nonpublic is available only where there is (1) clear evidence of an intent not to establish a public forum or (2) evidence that "the nature of the property is inconsistent with expressive activity." *Cornelius v. NAACP Legal Defense and Educational Fund,* 473 U.S. at 803. The school's policy and prior practice suggest that school officials had no intent to limit the forum prior to their groundbreaking decision to reject Respondents' request to form a club. Rather the district court's description of Dr. Findley's and Dr. Tangdall's strained testimony as to the "curriculum-relatedness" of certain permitted clubs, *see supra,* n. 13, smacks of an after-the-fact rationalization of a discriminatory decision. In this respect it is

reminiscent of the familiar tactic of facilitating unconstitutional discrimination by vesting power in government officials to restrict speech without providing accompanying standards limiting the exercise of such power. *See, e.g., Shuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).[14]

The school officials also cannot sustain their finding that the forum was not open to Respondents' group on the ground that the nature of school property is inconsistent with such expressive activity. In *Hazelwood,* ___

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[14]The danger inherent in permitting government officials to use their discretion to suppress protected speech has not gone unnoticed. In *Board of Airport Commissioners v. Jews for Jesus,* ___ U.S. ___, 107 S.Ct. 2568 (1987), the Board of Airport Commissioners of Los Angeles International Airport passed a resolution declaring the airport to be closed to all "First Amendment activities." *Id.* at ___, 107 S.Ct. at 2570. In an unsuccessful effort to save the resolution from a finding of facial overbreadth, the Board argued that the resolution should be construed to prohibit only speech which was not "airport related." *Id.* at ___, 107 S.Ct. at 2572. The Court, in a unanimous opinion, held that officials could not constitutionally base a decision to suppress particular speech on a governing standard as vague as "airport relatedness":

> [T]he vagueness of this suggested construction itself presents serious constitutional difficulty. The line between airport-related speech and nonairport-related speech is, at best, murky. The petitioners, for example, suggest that an individual who reads a newspaper or converses with a neighbor at LAX is engaged in permitted "airport-related" activity because reading or conversing permits the traveling public to "pass the time." We presume, however, that petitioners would not so categorize the activities of a member of a religious or political organization who decides to "pass the time" by distributing leaflets to fellow travelers.

Id. at ___, 107 S.Ct. at 2573 (citations omitted).

The "curriculum-related" standards allegedly drawn from Board Policy 5610 no more confine the discretion of Westside officials in censoring Respondents' religious speech than the "airport-related" standard would have confined airport officials in suppressing that of citizens engaging in protected activities at LAX. Petitioners have claimed that Policy 5610 is the basis for the claim that clubs must be "curriculum-related," *see Mergens,* slip op. at 11, but the Policy provides no ascertainable basis for their determination, first, that clubs must be "curriculum-related" and, second, for making a judgment as to which clubs are "curriculum-related." Thus, Board Policy 5610 is unconstitutionally overbroad and the actions of the officials taken in reliance on the Policy were impermissible.

U.S. ___, 108 S.Ct. 562 and *Fraser*, 478 U.S. 675, the Court concluded that the nature of the high school setting justified censoring student speech. However, these cases expressly did *not* abandon the long acknowledged recognition that:

> [Students] cannot be punished merely for expressing personal views on the school premises — whether "in the cafeteria" or on the playing field, or on the campus during the authorized hours" . . . unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or infringe on the rights of other students."

Hazelwood, 108 S.Ct. 567, *quoting*, *Tinker*, 393 U.S. at 512-13.

While the school may disassociate itself from speech that is inconsistent with the fundamental values of public school education, *id.*, religious speech has not been regarded by this Court as contrary to these fundamental values. According to *Fraser*, "tolerance of divergent political and religious views" are among the values the public education system is designed to foster. 478 U.S. at 681. It would seem strange indeed if *exclusion* of Respondents' speech were deemed an appropriate means of teaching this tolerance. The school officials' interest in preserving the values of the educational system clearly thus does not justify exclusion of student religious activity during club periods.

Furthermore, there is no need for school authorities to exclude or censor Respondents' speech in order to disassociate themselves from its religious content. Participation in club activities is entirely voluntary. Such activities are hardly sponsored by the school in the same sense as a journalism class newspaper distributed on campus, or a speech given at a mandatory school assembly. Respondents will not have gained "the imprimatur of the school" merely by winning official permission to meet on campus. *See Hazelwood*, 108 S.Ct. at 570, n. 3, *citing*, *Papish v. Board of Curators*, 410 U.S. 667 (1973) (per curiam) (distribution of underground newspaper).

In sum, the content of Respondents' speech hardly disqualifies it from the general protection afforded under *Tinker*. Certainly, neither *Fraser* nor *Hazelwood* purports to change these general principles, and hence neither should be deemed contrary to the decision of the Eighth Circuit. Indeed, there has been no suggestion that a Bible club will be any more disruptive to the school's educational mission than any other club.

C. Petitioners Have Not Shown A Compelling State Interest To Justify Singling Out Respondents For Exclusion From The Club Forum.

In order to justify a content-based speech exclusion from a public forum or a limited public forum, the government must demonstrate a compelling state interest. *Widmar*, 454 U.S. at 270. The school officials' articulated "compelling interest" here — avoiding an "establishment of religion" — is without merit. *Widmar*, 454 U.S. at 273. On several occasions the Court has held that public programs which provide benefits to religion and nonreligion alike do not violate the Establishment Clause.

In *Widmar v. Vincent*, the Court held that it would not violate the Establishment Clause for a university to make public facilities available to religious speakers provided that the same facilities were open for use by a "broad class of non-religious speakers." 454 U.S. at 274. Applying the three-part *Lemon* test, the Court concluded that such a nondiscriminatory policy would advance a secular purpose by "provid[ing] a forum in

which students can exchange ideas," *id.* at 271, n. 10, and would "avoid entanglement with religion," *id.*, n. 11. Concerning whether the policy would have the primary effect of advancing religion, the Court held:

> [W]e are not oblivious to the range of an open forum's likely effects. It is possible — perhaps even foreseeable — that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.
>
> We are satisfied that any religious benefits of an open forum at UMKC would be "incidental" within the meaning of our cases.

Id. at 273 (citations omitted).

The Court has also permitted incidental benefits to religion in the high school setting without finding an Establishment Clause violation. For instance in *Mueller v. Allen*, 463 U.S. 388 (1983), the Court upheld a Minnesota statute allowing taxpayers, in computing their state income tax, to deduct expenses incurred in providing "tuition, textbooks and transportation" for their children attending elementary or secondary school. In *Everson, supra*, the Court concluded that a State may reimburse parents for bus fares incurred in sending their children to sectarian schools. In *Board of Education v. Allen*, 392 U.S. 236 (1968), the Court permitted the government to loan textbooks to children attending religious schools.[15]

The rationale underlying *Widmar, Mueller, Allen*, and *Everson* is dispositive in the present case. Respondents

[15]The Court reached a similar result in *Witters v. Washington Dept. of Service for the Blind*, 474 U.S. 481 (1986), holding that a state may extend financial assistance under a vocational rehabilitation program to a blind person who wanted to study at a Christian college.

are merely asking that the school allow them to meet after school on equal terms with other student groups. That is, they are requesting to receive the same public benefits conferred on others who are equally situated. The School Board's purpose in allowing student groups to meet on school property has a manifestly "secular purpose" — encouraging student initiative and exchange in the marketplace of ideas. Its practical effect entails no entanglement between church and state. As to the "effect" of letting Respondents meet on the school campus, any benefits to religion are surely incidental to a policy designed to benefit all students. Denying Respondents permission to use school facilities out of a generalized, but unsubstantiated, fear of "establishing religion" only serves to discriminate against religion. This result is neither mandated nor permitted by the Constitution.[16]

D. Even If The Westside Club Program Were A Nonpublic Forum, Petitioners' Actions Would Be Constitutionally Prohibited Because They Amount To Discrimination Against Respondents' Viewpoint.

Even in a nonpublic forum, the decision of school officials to restrict protected speech is limited by the requirement that such actions not discriminate on the basis of viewpoint. Content-based restrictions of "sub-

[16]Also illustrative of the general point that the government cannot justify discriminating against religion out of general "establishment" fears is the Court's decision in *McDaniel v. Paty, supra.* In that case, the state sought to justify its constitutional provision precluding clergy members from holding elected office as necessary to prevent "the establishment of a state religion." *Paty*, 435 U.S. at 629. The Court held there was insufficient evidence that clergy participation in government would result in an establishment of religion to justify forcing ministers to forego their religious calling in order to exercise the right to hold public office enjoyed by other citizens. *Id.* So too in this case, the Respondents should not be denied a public benefit merely because they are asking the government to accommodate religious speech.

ject matter" are permissible in a nonpublic forum, but "viewpoint" restrictions are impermissible. *Cornelius*, 473 U.S. at 806. In the context of an educational institution, religion provides one of many perspectives for understanding any given subject matter. Accordingly, it contributes a "point of view . . . on an otherwise includible subject," *id.*, and thus may not be censored. As Justice Stevens observed in *Widmar*,

> Quite obviously . . . the University could not allow a group of Republicans or Presbyterians to meet while denying Democrats or Mormons the same privilege. It seems apparent that the policy under attack would allow groups of young philosophers to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group deserving to express a belief in God must also be permitted.

454 U.S. at 281 (Stevens, J., concurring).

That Petitioners discriminated against Respondents' religious viewpoint becomes clear when assessing their policy as to other views. The district court found that there was a calculated effort on the part of school officials to "encourage frank discussion of controversial issues" during instructional time. *Mergens*, slip op. at 13. Discussion topics included "drugs, separation of church and state, Vietnam protests, use of arm bands, atheism, abortion, homosexuality, birth control, premarital sex, nuclear war and Contra aid." *Id.* Nevertheless, one of the school administrators testified, somewhat ironically given the administration's avowed purpose of presenting a "balanced point of view" and "exposing students to all sides of controversial issues," that "permitting a sanctioned Christian group would stand in conflict with

this policy," *Id.*[17] It is curious that Westside officials have concluded that a religious perspective is too "unbalanced" to contribute to discussion of topics including separation of church and state, atheism, and a host of social issues such as birth control and homosexuality. This amounts to blatant viewpoint discrimination.

Although the school administrator's actions might have been well-intentioned, they were not constitutionally permissible. "[S]chools . . . may not be run in such a manner as to 'prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion'." *Board of Education v. Pico*, 457 U.S. 853, 876 (1982) (Blackmun, J., concurring in part and concurring in the judgment), *quoting, West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). *See also, Hazelwood*, ___ U.S. ___, 108 S.Ct. at 577 (Brennan, J., dissenting).

CONCLUSION

Petitioners' decision to exclude Respondents from meeting after school on equal terms with other students is offensive to the First Amendment's protection of free speech and religious liberty, and is antithetical to our country's heritage. In the words of the *Williamsburg Charter*:

> [T]he Religious Liberty provisions hold the key to American distinctiveness and American destiny. Far from being settled by the interpretations of judges and historians, the last word on the First Amendment likely rests in a chapter yet to be written, documenting the unfolding drama of America. If religious lib-

[17] Not surprisingly, this same administrator removed a poster on a school bulletin board advertising an evangelistic speaker. *Id.*

> erty is neglected, all civil liberties will suffer. If it is guarded and sustained, the American experiment will be the more secure.

Id. p. 12.

Petitioners have not only neglected Respondents' religious liberty, they have been hostile to it. For this reason, and the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 88–1597

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS, et al.,
Petitioners

v.

BRIDGET C. MERGENS, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE SPECIALTY RESEARCH ASSOCIATES, INC. SAVE AMERICA'S YOUTH, INC. IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. THIS COURT'S PROHIBITING ACCESS BY STUDENTS TO RELIGIOUS PRINCIPLES WAS A RADICAL CHANGE IN ITS JURISPRUDENCE 3

A. States Regularly Encouraged Religious Activities as Part of Public Education Long After Ratification of the Fourteenth Amendment 3

B. The Court's Decision in *Engel* was a Radical Jurisprudential Aberration 6

C. Lower Courts have Rendered Increasingly Irrational Decisions Because of this Aberration 8

II. ACCESS BY STUDENTS TO RELIGIOUS PRINCIPLES IS IMPORTANT 10

A. Early Decisions by this Court Recognized the Importance of Exposure to Religious Principles 10

B. This Court's Decisions Currently Protect Religious Teachings Which Foster Immorality but Restrict Student Access to Religious Teachings Which Foster Traditional Morality 12

C. Restricting Access to Religious Teachings Which Foster Traditional Morality Have Devastated This Nation's Youth 20

D. Access by Students to Teachings Which Provide Internal Restraint is Important 21

E. Access by Students to Voluntary Bible and Religious Clubs is Important 23

III. THE EQUAL ACCESS ACT PREVENTS HOSTILITY TOWARD RELIGION 24
A. The Equal Access Act Gives Religion the Same Recognition as Non-Religion 24
B. Failure to Uphold the Equal Access Act Will Establish Non-Religion as Dominant Over Religion 25
C. Failure to Uphold the Equal Access Act Makes Students "Mere Creatures of the State" 26
IV. CONCLUSION 27

TABLE OF AUTHORITIES

Page

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Anderson v. Salt Lake City Corp., 475 F. 2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 8
Bowen v. Kendrick, 108 S.Ct. 2562 (1988) 21
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School Laws of Delaware 4
Slater, *"Abortion Stand Gives Planned Parenthood New Goals, New Foes,"* Wall St. J., June 25, 1988 13
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U.S. Department of Health and Human Services 16,17, 19, 20
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NO. 88-1597

THE BOARD OF EDUCATION OF THE
WESTSIDE COMMUNITY SCHOOLS, et. al.
Petitioners

V.

BRIDGET C. MERGENS, et. al.,
Respondents

On Appeal from the United States Court of Appeals for the Eighth Circuit

BRIEF OF AMICI CURIAE
SPECIALTY RESEARCH ASSOCIATES, INC.
SAVE AMERICA'S YOUTH, INC.
IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI

Specialty Research Associates, Inc., is a research group based in Aledo, Texas, which researches in two primary spheres: (1) the investigation of public policies concerning public education, particularly as those policies may relate to what is termed "traditional values," and any effects that those policies might have on education or on students; (2) historical research investigating incidents or previous public policy positions which might have direct application to problem areas today.

The amici file brief to assist the Court in the present case, believing that the Court's consideration of the Equal Access Act should be accompanied by an understanding of the impact that its decision will have on America's youth. The amicus offers information which shows a direct correlation between the access of students to support groups and teachings which

can provide traditional values and the effect those teachings have on schools and on students, collectively and individually.

Save America's Youth, Inc., is a non-profit educational and public policy organization headquartered in Washington, D.C. It is devoted to issues concerning teenagers and the problems they face in America today. It approaches these issues from a perspective grounded in a commitment to traditional moral values. It believes that the fundamental liberty of religious exercises is essential for young people and that measures like the Equal Access Act, which guarantee this liberty, contribute to their successful growth and development. The Constitution ensures, rather than prohibits, this liberty.

SUMMARY OF THE ARGUMENT

This case investigates the question of whether the Equal Access Act is a constitutional act and whether it can be permissible for religious clubs to congregate during non-instructional time in the same manner in which non-religious clubs gather. No sound education goal is served by exposing students to non-religious aspects of society and not allowing them equal opportunity to choose to be exposed to the religious aspects of society and to the important societal consequences arising from religion.

The Court's ruling in this case should be preceded by an honest assessment of the measurable consequences to students which have occurred since their access to religious principles was severely restricted. This Court's unclear and varying positions on religion in public arenas have allowed many lower courts to aggressively pursue policies hostile to religion, allowing no accommodation for any type of activity which even remotely purports to be religious, no matter how non-sectarian or voluntary its nature may be.

It has been long recognized and openly acknowledged, not only by this Court through many previous decisions, but also by leading historians, philosophers, and educators, that religious principles are the moral basis for this nation and that without that moral basis this nation cannot long remain atop its problems. In 1962-63, this Court first placed severe restrictions on the access of students to any voluntary exposure to the basic religious principles recognized as the

source of morality. Since that time, this nation has become the world's leader in numerous unenviable categories related to student morality (e.g., teenage pregnancies, STDs, sexual activity, etc.). Graphs are presented to document the abrupt changes in the patterns of student morality which began when student access to religious principles was dramatically restricted through the unprecedented rulings in 1962-1963.

This Court has often stated that neither religion nor non-religion could be given preference above the other. Only by upholding the Equal Access Act can the Court be consistent with its previous declarations. To overturn the Equal Access Act will be to establish non-religion in preference to religion and will be to clone students into an educational system which endorses non-religion as the only philosophical approach to life available for students. Such a system would violate the stand of this Court which has maintained that students are not "mere creatures of the State."

ARGUMENT:

I. THIS COURT'S PROHIBITING ACCESS BY STUDENTS TO RELIGIOUS PRINCIPLES WAS A RADICAL CHANGE IN ITS JURISPRUDENCE

A. States Regularly Encouraged Religious Activities as Part of Public Education Long After Ratification of the Fourteenth Amendment

For decades following the passage of the Fourteenth Amendment in 1868, religious activities had either been indirectly permitted or directly encouraged as part of public education in America, as evidenced by the laws of most of the states. The following examples illustrate laws typical of those in most states, laws passed nearly six decades *after* the Fourteenth Amendment, laws which were upheld as constitutional:

> FLORIDA--Whereas, it is in the interest of good moral training, of a life of honorable thought and good citizen-

ship, that the public school children should have lessons of morality brought to their attention during their school days, therefore, Be it Enacted by the Legislature of the State of Florida:
Section 1. That all schools in this state that are supported in whole or in part by public funds, be, and the same are, hereby required to have once every school day reading in the presence of the pupils from the Holy Bible, without sectarian comment. [1]

DELAWARE--Section 2. In each public school classroom of the state, and in the presence of the scholars therein assembled, at least five verses from the Holy Bible shall be read at the opening of such school...[2]

IDAHO--Section 2. That teachers...shall...read, without comment or interpretation, from twelve to twenty verses from...the Bible...[3]

In 1963 in *Abington v. Schempp*, this Court changed its application of the Fourteenth Amendment, reversed its position, and declared these laws no longer to be constitutional. The law challenged in 1963 was substantially identical to those previously upheld:

> At least ten verses from the Holy Bible shall be read, without comment....Participation in the opening exercises...is voluntary....There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. [4]

1. C. Lischka, *Private Schools and State Laws* 275-76 (1925), quoting *Florida Laws Relating to Education.*
2. *Id.*, quoting *School Laws of Delaware, 1925* 65-66.
3. *Id.*, quoting *Idaho Session Laws, 1925* Chapter 35 at 48-9.
4. *School Dist. of Abington Twp.v. Schempp*, 374 U.S. 203, 205, 207 (1963).

This Court acknowledged that the application of the Fourteenth Amendment to the Establishment Clause was something of recent origin, something which did not occur until 79 years ***after*** the ratification of the Fourteenth Amendment

> The Establishment Clause was not incorporated in the Fourteenth Amendment until *Everson v. Board of Education* was decided in 1947....The meaning of the Establishment Clause and the Free Exercise Clause [has been] made applicable to the States for only a few decades at best. [5]

In *McCullom v. Board of Education,* the Court explained why it had waited 79 years to apply the Fourteenth Amendment against these previously constitutional state laws. It presented accounts from the Congress which originally passed the Fourteenth Amendment, showing what had happened to attempts to join the Fourteenth Amendment to the Establishment Clause through the Blaine Amendment, which had stated:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof...No public property, and no public revenue...shall be appropriated to...the support of any school...under the control of any religious or anti-religious sect, organization or denomination...And no such particular creed or tenets shall be read or taught in any school or institution supported...by such revenue...[6]

The *McCollum* Court explained that the Blaine Amendment, as well as five similar ones attempting to join the Fourteenth Amendment to the Establishment Clause, were ***voted down*** by that Congress:

The reason for the failure of these attempts seems to

5. *Walz v. Tax Commission*, 397 U.S. 664, 702, 703 (1970).
6. *McCollum v. Board of Education*, 333 U.S. 203, 218, 219 (1948).

have been in part that the "provisions of the State constitutions are in almost all instances adequate on this subject, and no amendment is likely to be secured." *Id.* H. Res. 1, 44th Cong., 1st Sess. (1876). [7]

The Congress which drew the Fourteenth Amendment had rejected ***six*** attempts to make the Establishment Clause apply to the states through the Fourteenth Amendment because "the State constitutions are in almost all instances adequate on this subject." Following the legislative intent of that Congress, no previous Court had applied the Fourteenth Amendment to the Establishment Clause until the *Everson* Court.

Even in the years immediately following the *Everson* decision, this Court did not abandon the longstanding practice of commingling religious activities with education. Rulings after *Everson* (e.g., *Zorach)* only narrowly restricted the interface that existed between public education and religious activities. This Court continued to uphold the constitutionality of students receiving religious instruction during the school day. The complete sterilization of public education from Judeo-Christian values and beliefs is something of recent origin.

B. This Court's Decision in *Engel* was a Radical Jurisprudential Aberration

In 1962, this Court radically changed its interpretation of what was to be allowed in the states under the First as made applicable by the Fourteenth Amendment. As this Court noted in *Walz:*

> It was, for example, not until 1962 that...prayers were held to violate the Establishment Clause...[8]

The *Abington* Court acknowledged that its decision was without precedent:

> Finally, in Engel v. Vitale, only last year, these princi-

7. *Id.* at 218.
8. *Walz v. Tax Commission,* 397 U.S. 664, 702 (1970).

> ples were so universally recognized that the Court, *without the citation of a single case*...reaffirmed them. (emphasis added) [9]

Outside observers also noted the new position of the Court toward the relationship between religion and education following the *Engel* decision:

> The significance of the decision regarding this prayer was enormous, for the whole thorny problem of religion in public education *was thus inevitably raised.* (emphasis added) [10]

> *The Court has broken new ground* in a number of fields. Few Supreme Court decisions of recent years have created greater furor than *Engel v. Vitale* (370 U.S. 421)... (emphasis added) [11]

Before the *Engel* decision, this Court had maintained that:

> The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State...Otherwise the state and religion would be aliens to each other--hostile, suspicious, and even unfriendly...[12]

In the twelve month period between June of 1962 and June of 1963, through the *Engel, Abington, and Murray* decisions, this Court effectively removed all religious activities from public schools.

There is now an apparently religion-hostile and religion-unfriendly position taken toward ***any*** exposure to religion in public schools. For example, although acknowledging in

9. *School Dist. of Abington Twp. v. Schempp,* 374 U.S. 203, 220, 221 (1963).
10. L. Cremin, *Yearbook of the World Book Encyclopedia* 38 (1963).
11. Editorial Research Reports, Sept. 28, 1966, at 707-08.
12. *Zorach v. Clauson,* 343 U.S. 306, 312 (1952).

1973 that the Ten Commandments were the basis of laws in the Western World,[13] in 1980 this Court declared it unconstitutional for students to be passively exposed to the basis for those laws while at school.[14] In 1985, this Court declared that it would be ironic if a creche were to be a violation of the Establishment Clause since it was the primary symbol of the holiday declared by Congress to commemorate "...an event acknowledged in the Western World for 20 centuries, and in this country by the people, the Executive Branch, Congress, and the courts for 2 centuries."[15] This Court thus concluded that "To forbid the use of this one passive symbol...would be an overreaction contrary to this Nation's history..."[16] Yet, this year the Court completed the irony it previously decried by declaring stand-alone displays of the creche, commemorating the purpose for which the national holiday was established, to be unconstitutional unless used in conjunction with other related displays. That position is comparable to requiring that any display depicting Dr. Martin Luther King on the holiday commemorating his remembrance must also include a burning cross and a Confederate flag in order to be constitutional. Although such a position is unthinkable in a civil area, the same logic appears to be completely acceptable if applied to a religious issue.

C. Lower Courts Have Rendered Increasingly Irrational Decisions Because of this Aberration

As a result of confusing standards applied by this Court toward religious expressions in public areas, many lower courts have developed a paranoia over tolerating any appearance of religion in public arenas. For example, lower courts have declared that freedom of speech and press is guaran-

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13. *Anderson v. Salt Lake City Corp*, 475 F. 2d 29, 33 (10th Cir. 1973), *cert. denied*, 414 U.S. 879, see also *Stone v. Graham*, 449 U.S. 39, 45 (1980), Rehnquist dissenting.
14. *Stone v. Graham*, 449 U.S. 39, 42 (1980).
15. *Lynch v. Donnelly*, 465 U.S. 668, 669-70 (1985).
16. *Id.* at 670.

teed to students unless the topic is religious, at which time such speech becomes unconstitutional;[17] if a student prays over his lunch, it is unconstitutional for him to pray aloud;[18] it is unconstitutional for a war memorial to be erected in the shape of a cross;[19] it is unconstitutional for a Board of Education to use or refer to the word "God" in any of its official writings.[20]

Public schools were barred from showing a film about the settlement of Jamestown because the film depicted the erection of a cross at the settlement, despite the historical fact that a cross *was* erected at the Jamestown settlement;[21] in the Alaska public schools, students were told they could not use the word "Christmas" in school because it had the word "Christ" in it, nor could they have the word in their notebooks, nor exchange Christmas cards or presents, nor display anything with the word "Christmas" on it;[22] in 1987, a 185-year-old symbol of a Nevada city had to be changed because of its "religious significance" and a fire station was forced to remove a cross placed in remembrance of a fellow fireman who lost his life in the line of duty;[23] in Virginia, a federal court has ruled that a homosexual newspaper may be distributed on a high school campus, but religious newspapers may not;[24] and in Colorado, a music teacher was stopped from singing traditional Christmas carols in her classes.[25]

Such decisions by lower courts clearly constitute a discrimination on the basis of creed. Following nationwide criticism of such over-reaction by the lower courts, Congress passed the

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17. *Collins v. Chandler Unified School District*, 644 F. 2d 759, *cert. denied*, 454 U.S. 863, (1981); *Stein v. Oshinsky*, 348 F. 2d 999 (2nd Cir. 1965), *cert. denied*, 382 U.S. 957.
18. *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965).
19. *Lowe v. City of Eugene*, 451 P. 2d 117 (S.Ct. Oregon 1969), *cert. denied*, 434 U.S. 876.
20. *State of Ohio v. Whisner*, 47 Ohio St. 2d 181, 351 N.E. 2d 750 (1976).
21. J. Eidsmoe, *Christianity and the Constitution* 406 (1987).
22. Murray, *"America Without God,"* The New American, June 20, 1988, at 19.
23. T. LaHaye, *Faith of Our Founding Fathers* 27 (1987).
24. Murray, *supra* note 22, at 19.
25. *Parent Silences Teaching of Carols,"* Wash. Times, Dec. 12, 1988.

Equal Access Act of 1984 in order to eliminate this hostility toward religion and to guarantee to religious groups the same access to school facilities that was extended to others.

In 1987, the *Harvard Journal on Legislation* reviewed the progress of the Equal Access Act through the lower Courts. At that time, because of the paranoia over allowing religious expressions in public arenas:

> All four courts of appeals which have ruled on the issue held that granting equal access violated the Establishment Clause. [26]

II. ACCESS BY STUDENTS TO RELIGIOUS PRINCIPLES IS IMPORTANT

A. Early Decisions by This Court Recognized the Importance of Exposure to Religious Principles

It has been widely accepted in this country that exposure to religious principles, such as those available through voluntary Bible Clubs, has a definite positive impact on students, on education, and on society. Previous legal rulings clearly have held that national morality could not exist apart from religious principles.

> We stand equally in need, now as formerly, of all the moral discipline, and of those principles of virtue, which help to bind society together....the morality of the country is deeply engrafted upon Christianity...[we are] people whose manners,..and whose morals have been elevated and inspired...by means of the Christian religion....Though the Constitution has discarded religious establishments...this [constitutional] declaration never meant to withdraw religion in general, and with it

26. Strossen, *"A Constitutional Analysis of the Equal Access Act's Standards Governing Public School Student Religious Meetings,"* 24 Harv. J. Legis. 117, 118 (1987).

> the best sanctions of moral and social obligation...[27]
>
> The morality of the country is deeply engrafted upon Christianity...[28]
>
> The purest principles of morality ***are*** to be taught. Where are they found? Whoever searches for them must go to the source from which a Christian man derives his faith--the Bible. [29]
>
> Christianity has reference to the principles of right and wrong...it is the foundation of those morals and manners upon which our society is formed; it is their basis. Remove this and they would fall...[morality] has grown upon the basis of Christianity. [30]
>
> The morality of the country is deeply engrafted upon Christianity...people whose manners are refined and whose morals have been elevated and inspired with a more enlarged benevolence by means of the Christian religion. [31]
>
> The morality of the country is deeply engrafted on Christianity. [32]
>
> What constitutes the standard of good morals? Is it not Christianity? There certainly is none other...The day of moral virtue in which we live would, in an instant, if that standard were abolished, lapse into the dark and murky night of...immorality. [33]
>
> Whatever may be conceded to the influence of refined

27. *People v. Ruggles*, 8 Johns 470, 546 (1811).
28. *Church of the Holy Trinity v. U.S.*, 143 U.S. 457, 471 (1892).
29. *Vidal v. Girard's Executors*, 43 U.S. 127, 153 (1844).
30. *City of Charleston v. S.A. Benjamin*, 2 Strob. 508, 520 (1846).
31. *People v. Ruggles*, 8 Johns 470, 546 (1811).
32. *Updegraph v. The Commonwealth*, 11 Serg. & R. 393, 404 (1824).
33. *City of Charleston v. S.A. Benjamin*, 2 Strob. 508, 523 (1846).

education...reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle. [34]

By prohibiting students access to religious principles while at school, the Court has prohibited them access to principles which produce morality along traditional standards. School is where students receive the greatest pressure to ignore previously accepted societal norms; school is where students should receive the greatest access to the support to combat those pressures. This Court's former position on encouraging traditional morality was clear:

> There have been sects which...advocated promiscuous intercourse of the sexes as prompted by the passions of its members...Should a sect of [this] kind ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that...their supporters could be protected in their exercise by the Constitution of the United States. [35]

B. This Court's Decisions Currently Protect Religious Teachings Which Foster Immorality but Restrict Student Access to Religious Teachings Which Foster Traditional Morality

Sects "advocating promiscuous intercourse of the sexes" now operate in public education under the Court's "constitutional" protection. Such teachings were previously termed by the Court to be sectarian teachings--religious teachings. Even those associated with groups like *Planned Parenthood*

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34. George Washington's Farewell Address, quoted from W.D. Lewis, *Washington's Farewell Address and Webster's First Bunker Hill Oration* 23-24 (1910); J. Finley & J. Sullivan, *American Democracy from Washington to Wilson* 14 (1919); G. Knight & R. Hardwood-Staderman, *What You Don't Know About George Washington* 59-60 (1941); and numerous others.

35. *Davis v. Beason*, 133 U.S. 333, 343 (1890).

acknowledge their teachings on sex are religious teachings.[36] While permitting these "religious" teachings which advocate promiscuous intercourse of the sexes, this Court has not protected students' access to the traditional religious teachings long held to be the source of the strong morality which previously characterized this nation.

Publications are now provided to students at schools by groups like *Planned Parenthood*, complete with photographs, illustrations, and graphics showing how to easily accomplish "promiscuous intercourse of the sexes." No less than 60 percent of American public school students report that they have had a "comprehensive" sex education program which promotes sexual activity.[37] Consider these "mild" excerpts from books and materials that *Planned Parenthood* recommends for adolescents:[38]

Boys and Sex

> More and more people are coming to understand that having sex is a joyful and enriching experience at any age. (p. 2)
>
> Playing with girls sexually before adolescence... increases the chances for a satisfactory sex life when a boy grows up. (p. 38)
>
> Premarital intercourse does have its definite values as a training ground for marriage...boys and girls who start having intercourse when they're adolescents...will find that it's a big help...it's like taking a car out on a test run before you buy it. (p. 117)
>
> Premarital intercourse among adolescents is often helpful in later life because it's easier to learn things in our earlier years. (p. 118)
>
> When people want to get close to each other, intercourse is the closest they can get. (p. 129)

Girls and Sex:

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36. Slater, *"Abortion Stand Gives Planned Parenthood New Goals, New Foes,"* Wall S. J., June 25, 1988.

37. U. S. Dept. of Educ., review of the 1986 *Planned Parenthood Poll* by Louis Harris and Associates, Inc., Dec. 1, 1987, at 2.

38. Hon. B. Bradley (Cal.-76 Dist.), informational packet excerpting books recommended by Planned Parenthood, Jan. 15, 1987.

Girls understand now that they are far more likely to make good social and sexual adjustments to life if they learn to be warm, open, responsive, and sexually unafraid. They're learning to be sexual partners of men... (p. 10-11)

Everyone's agreed...that teenage sex should be a learning experience...(p. 15)

Sex play with boys...can be exciting, pleasurable, and even worthwhile...it will help later sexual adjustment. (p. 48)

For those who plan on marriage eventually, early intercourse can also be a training ground. (p. 95)

Another reason for intercourse is the fact that...it's a means of learning how to live with people. (p. 96)

You've Changed the Combination:

There are only two basic kinds of sex: sex with victims and sex without. Sex with victims is always wrong. Sex without is always right (p. 10).

One way to avoid having victims is, of course, to have sexual relationships only with your friends (p. 12).

These groups provide publications to students which even encourage types of sexual activity and sodomy that are illegal in many states today (e.g., anal sex, oral intercourse, and tri-partner sex [39]). The effect that groups like *Planned Parenthood* have had on the nation in recent years (under this Court's protection) is apparent:

Two-thirds of America's 11 million teenage boys say they have had sex with a girl...By the time they are 18, on the average, boys have had sex with five girls. [40]

Most boys had their first sexual experience at 14 and

39. *Id.* Referenced from the books *Changing Bodies, Changing Lives* and *Our Bodies, Ourselves.*

40. Parade Magazine, Dec. 18, 1988. *See also* Hellmich, *"Teens Having Sex By 16,"* USA Today, Sept. 22-24, 1989, at 1A.

girls at age 15. [41]

Two-thirds of students surveyed (ages 12-15) felt rape was acceptable if a boy had been dating a girl for as long as 6-12 months and one-fourth felt rape was permissible if he had spent $10 to $15 on her on a date. [42]

Of those students who are sexually active, 65 percent had gone through a comprehensive sex education program. That sexual activity rate is almost twice the sexual activity level of those who have not completed a sex education curriculum. Additionally, 42 percent of those who have never been in a comprehensive sex education class which promotes "promiscuous intercourse of the sexes" have not had sexual intercourse. [43]

The contemporary Court is a party to the decline of America's morality. It has upheld the "rights" of groups to propagate teachings on immorality and has prohibited students' exposure to Biblical teachings on morality.

Did this Court's removal of religious principles from public schools have any tangible effect on student behavior? There is an unusually strong correlation which suggests those decisions to restrict student access to religious principles have had substantial social impact, as indicated by the following charts.

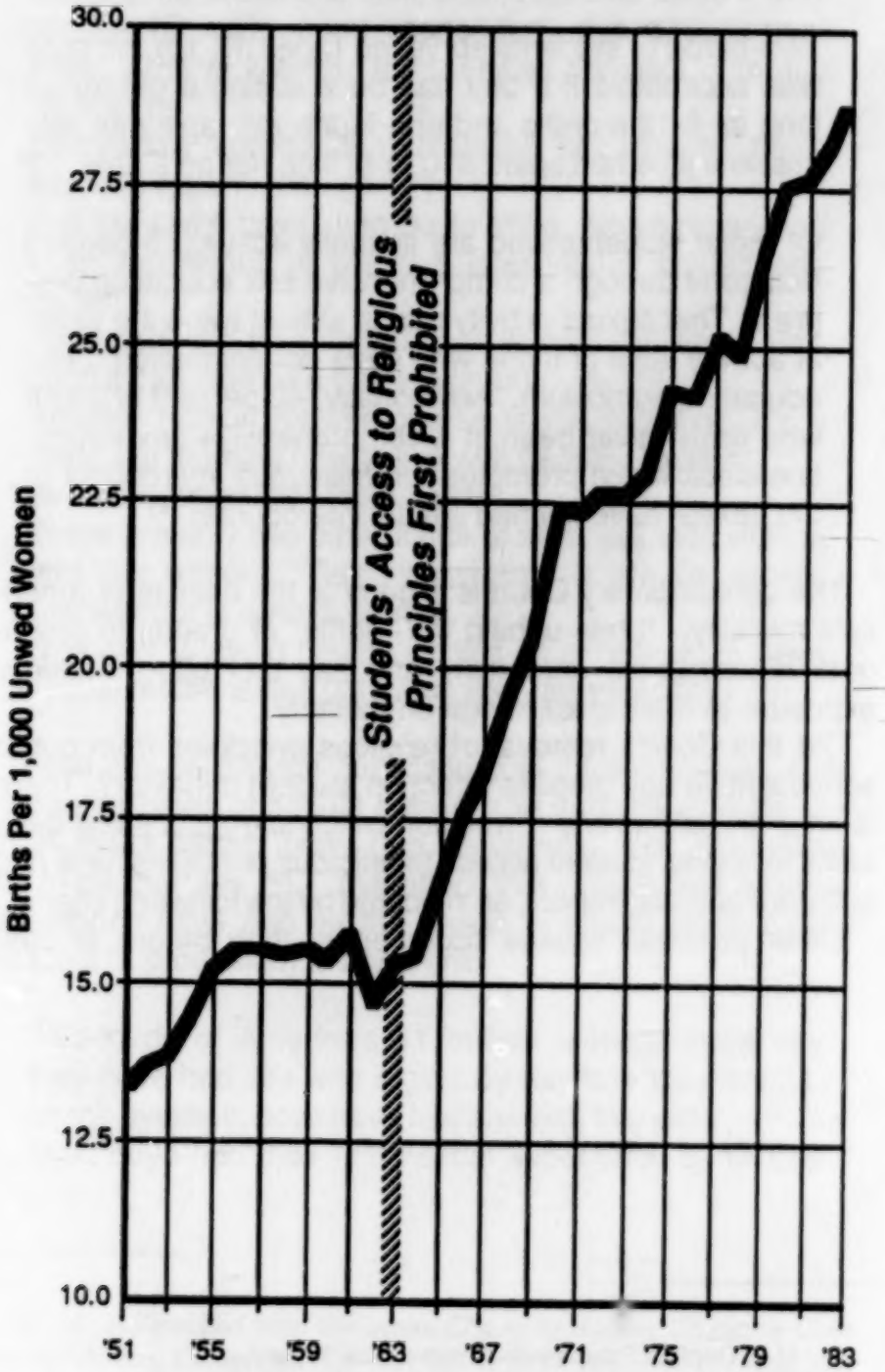
Other potential causes occur either long before or long

41. U.S. Dept. of Educ. review, *supra* note 37, at 2.

42. Study by Rhode Island Rape Crisis Center, released through *Providence Journal-Bulletin*, May 1, 1988.

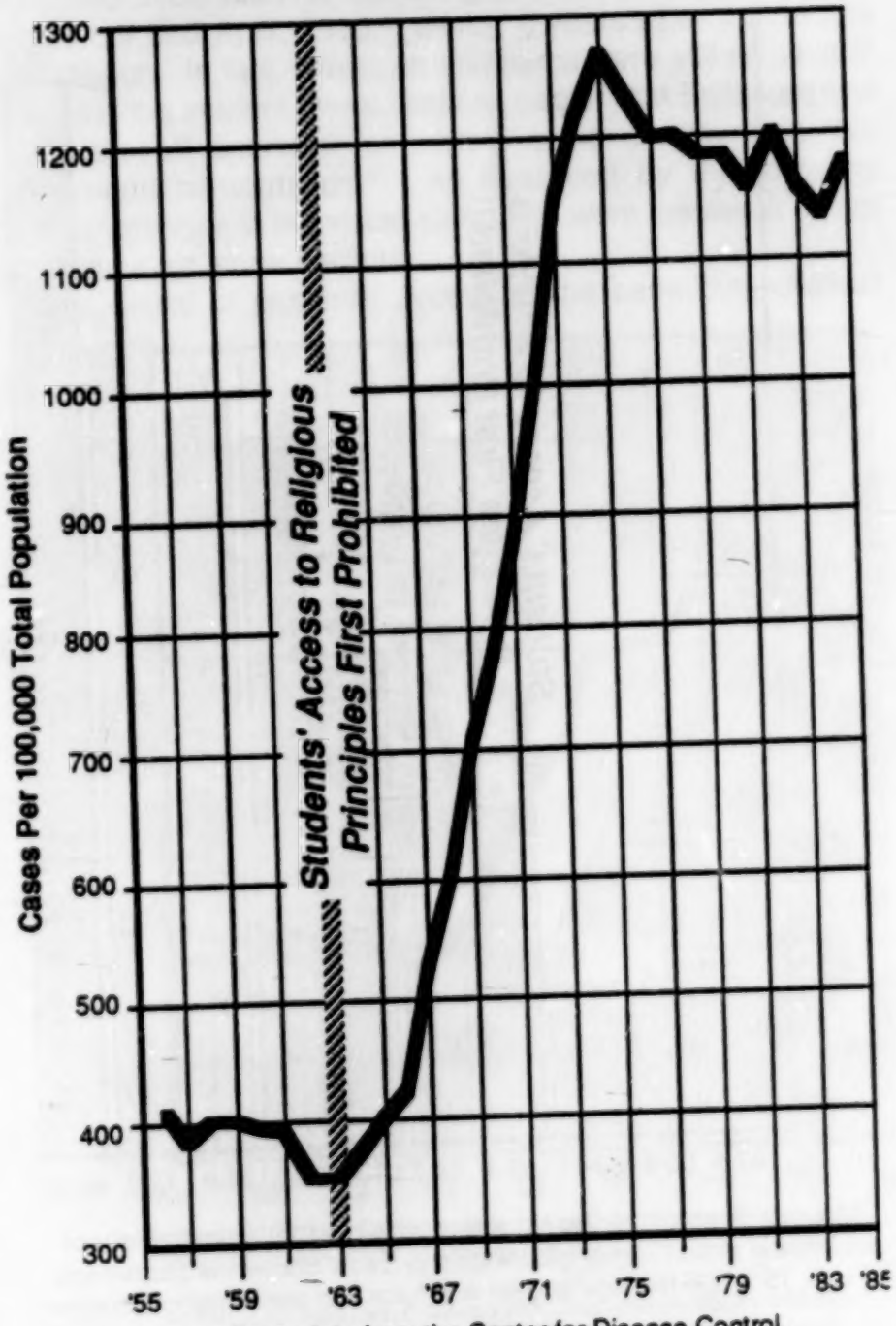
43. U.S. Dept. of Educ. review, *supra* note 37, at 3.

Births For Unwed Girls Ages 15-19



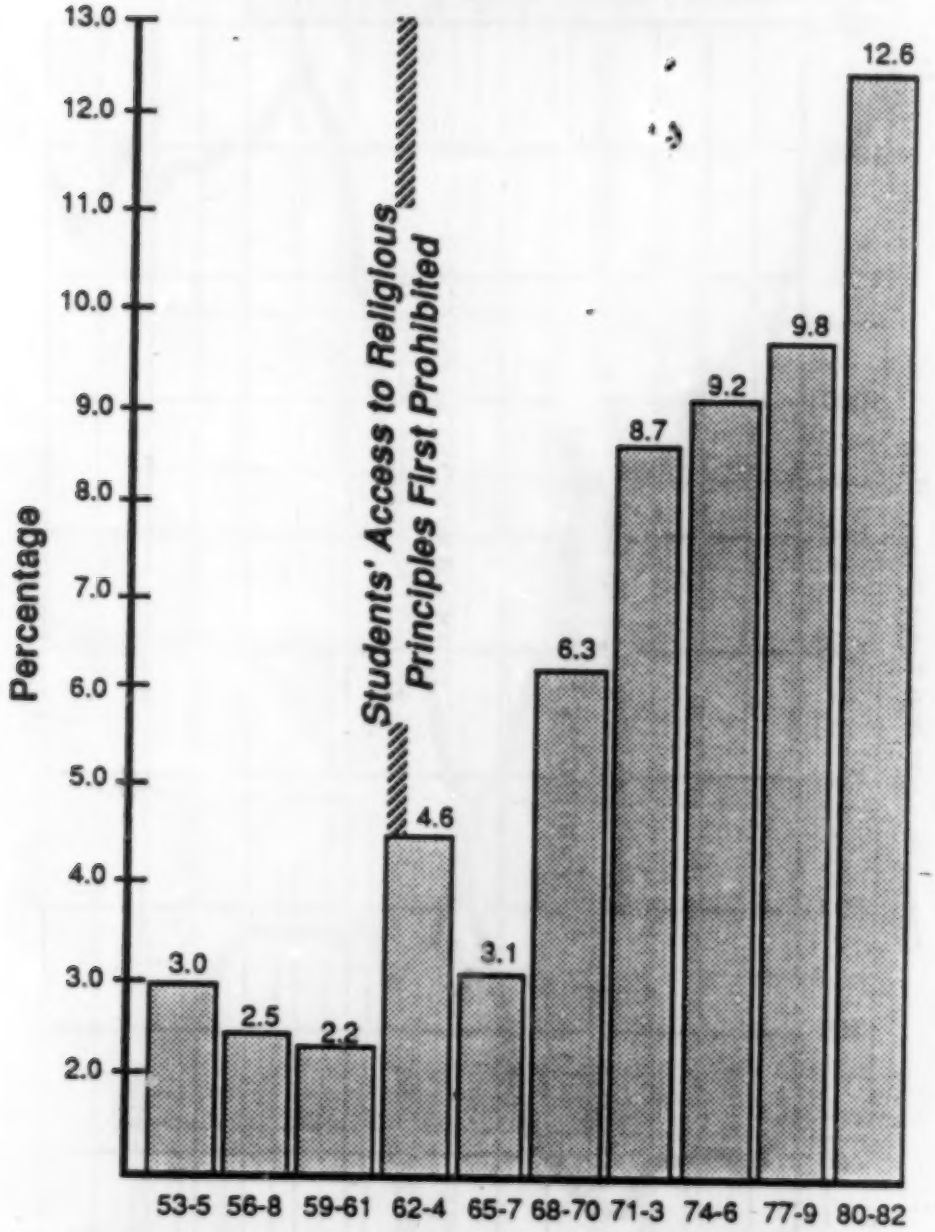
Basic data from Department of Health and Human Services, *Statistical Abstracts of the United States.*

Sexually Transmitted Diseases Gonorrhea: Age Group 15-19



Basic data from the Center for Disease Control, Department of Health and Human Services.

Premarital Sexual Activity Among Students Age 15

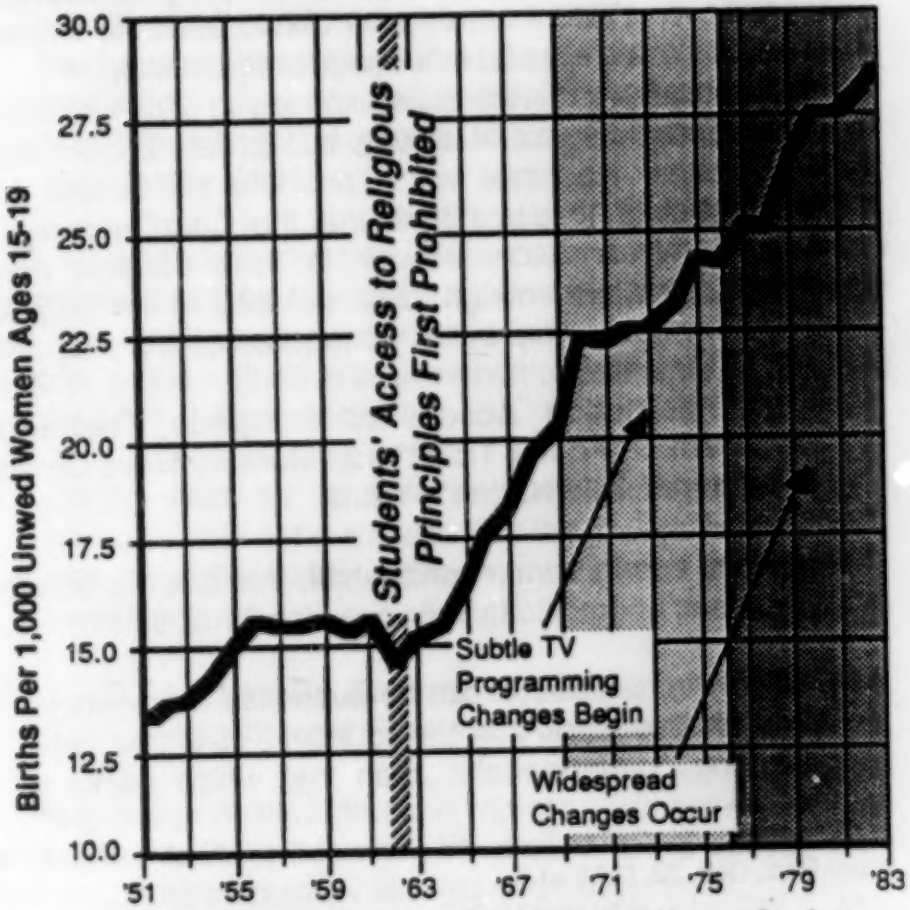


* The year in which the subject age group turned 15. Information was available in three (3) year groupings only.Table Shows the percentage of U.S. 15 yr. old teenage women who have had premarital intercourse.

Basic data from Family Planning Perspectives, Vol. 19, No. 2, March/April 1985. Furnished by Alan Guttmacher Institute.

after the declines in student morality began. For example, television must be ruled out as the cause for students' moral changes since the first loosening of television standards did not occur until April, 1969,[44] almost 6 years ***after*** the decline had begun. In fact, television standards were still so strict at the time the student moral declines began that 5 stations lost their seal of approval for merely airing commercials that mentioned hemorrhoids.[45] As illustrated by the following graph, changes in television standards were the result of, not the cause for moral declines.

The denial of students' access to the beneficial religious



Basic data from Department of Health and Human Services, *Statistical Abstracts of the United States.*

44. D. Barton, *Did Television Cause the Changes in Youth Morality?* 14-15 (1988).

45. *Id.* at 6.

principles long recognized as the source of morality has had definite impact. Now, over 1 million adolescent girls become pregnant each year[46] and 50 percent of sexually active males have had their first sexual experience between the ages of 11 and 13,[47] the very age in their life when they are not permitted any access at school, even voluntarily, to the basic religious principles which produce morality. Since this Court excluded Judeo-Christian principles from students, premarital sexual activity among 15 year old students has increased almost 500%; sexually transmitted diseases (i.e., gonorrhea) have increased over 200%; and teenage student pregnancies have increased over 400%,[48] causing the United States to become the Western World's leader in teenage pregnancies. [49]

The Court allows minors to be exposed to religious teachings which promote sexual activity, but "protects" them from Judeo-Christian teachings which promote self-control and internal restraints. It seems ironic that this Court feels that a "competent minor mature enough to have become pregnant"[50] is not mature enough to be exposed to the religious views which would help prevent her from becoming pregnant.

C. Restricting Access to Religious Teachings Which Foster Traditional Morality Have Devastated This Nation's Youth

For more than a century-and-a-half, this Court protected morality based on traditional religious standards, stating:

> Certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth...than that which seeks to

46. McBee, *"A Call to Tame the Genie of Teen Sex,"* U.S. News & World Rep., Dec. 22, 1986, at 8.
47. J. McDowell, *Why Wait?* (1987).
48. Percentages calculated from raw data obtained from Department of Health and Human Services and Center for Disease Control.
49. Family Planning Perspectives, *"Teenage Pregnancy in Developed Countries,"* Vol. 17, No. 2, Alan Guttmacher Institute, (March/April 1985).
50. *Planned Parenthood of Missouri v. Danforth,* 428 U.S. 52, 75 (1975).

> establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; [the family is] the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement... [51]

And only last year reiterating:

> [W]hen, as Congress found, "prevention of adolescent sexual activity and adolescent pregnancy depends primarily upon developing strong family values and close family ties"...it seems sensible for Congress to recognize that religious organizations can influence values and...family life. [52]

The Court correctly noted that matters like "the harm of premarital sex and the reasons for choosing adoption over abortion," matters of great concern to government and society, are "matters [that] are fundamental elements of religious doctrine." [53] It then concluded:

> On an issue as sensitive and important as teenage sexuality, it is not surprising that the government's secular concerns would...coincide... with those of religious institutions. [54]

D. Access By Student to Teachings Which Provide Internal Restraints Is Important

Religious principles produce morality, without which government could not survive. Morality, which proceeds from religion, must be publicly allowed and encouraged.

Civil laws only address externalized crimes; only religious

51. *Murphy v. Ramsey,* 144 U.S. 15, 45 (1885).
52. *Bowen v. Kendrick,* 108 S.Ct. 2562, 2573 (1988).
53. *Id.,* at 2576.
54. *Id.,* at 2576.

principles can address crimes while they are still internalized. In the case of murder, religion deals with it before it occurs; civil laws do nothing until after the fact. Civil laws cannot deal with the heart, which is the actual source of immorality, violence, crime, drug abuse, etc. Thomas Jefferson clearly articulated the same principle:

> The precepts of philosophy, and of the [old legal] code, laid hold of actions only. [Jesus] pushed his scrutinies into the heart of man, erected his tribunal in the region of his thoughts...[55]

Man must either be controlled by the internal restraints provided through religion, or he will be controlled by the threat of force and punishment from a civil authority:

> There are two powers only which are sufficient to control men and secure the rights of individuals and a peaceable administration; these are the combined force of religion and law, and the force or fear of the bayonet. [56]

> Men, in a word, must necessarily be controlled either by a power within them, or by a power without them; either by the Word of God, or by the strong arm of man; either by the Bible or by the bayonet. [57]

The internal restraints provided by religion are preferable to the external restraints which always occur too late:

> It is much easier to introduce and establish an effectual

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55. W. Linn, *The Life of Thomas Jefferson* 265 (1834). See also J. Eidsmoe, *supra* note 21, at 230.

56. Noah Webster, quoted in S. McDowell & M. Beliles, *Principles for the Reformation of Nations* Appendix (1988). Taken from Preface to the *Holy Bible containing the Old and New Testaments, in the Common Version*, with Amendments o' the Language, by Noah Webster, LL.D. New Haven, 1833.

57. Richard Winthrop in 1852, quoted in S. Dawson, *God's Providence in America's History* 5:4 (1988).

> system for preserving morals than to correct by penal statutes the ill effects of a bad system... [58]

E. Access by Students to Voluntary Bible and Religious Clubs is Important

The right for the Bible to be seen or used in all public institutions, particularly through voluntary Bible clubs, must be allowed not only as a part of true academic freedom, but out of consideration for the Country:

> It is impossible to enslave mentally or socially a Bible-reading people. The principles of the Bible are the groundwork of human freedom. *Horace Greely* [59]

> But for [the Bible] we could not know right from wrong. All things most desirable for man's welfare...are to be found portrayed in it. *Abraham Lincoln* [60]

The access of students to gather and voluntarily include the Bible is a practice which has definite secular value and which is a benefit to the entire society. This philosophy is not only proven by reason, but also by experience. According to a Department of Education report, the students who are the least sexually active as adolescents were those who participated in some type of religious activities.[61] The mere passive presence of a voluntary Bible club requires no substantial entanglement, only the same nominal custodial care requirements as for any non-religious club. The presence of such a group on campus can only benefit the general campus climate and would be consistent with the goals of true academic freedom.

III. THE EQUAL ACCESS ACT PREVENTS HOSTILITY

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58. Noah Webster, quoted in T. LaHaye, *supra* note 23, at 76-77.

59. S. Lacy, *Valley of Decision*8 (1988).

60. C. Macartney, *Lincoln and the Bible* 35 (1949) See also R. Flood, *The Rebirth of America* 37 (1986)

61. U.S. Dept. of Educ. review, *supra* note 37, at 1.

TOWARD RELIGION

A. The Equal Access Act Gives Religion the Same Recognition as Non-Religion

Such a religion-hostile and religion-unfriendly posture has been taken by this nation's courts in recent years that Congress was forced to declare the obvious: equal access is available, and there is no discrimination on the basis of religion or creed. Congress recognized that school is a forum in which an exchange of ideas occurs and that religion plays a substantial role in the operation of our society. Religious activities must not therefore be banned from any intelligent exposure and discussion, particularly when instituted by students who voluntarily join themselves to Bible clubs, prayer clubs, etc. These clubs serve as support and exchange groups for people of like interests, in much the same manner as do chess clubs, rodeo clubs, journalism clubs, etc.; they provide social value. Non-religious clubs had long been allowed, but society and students were being sterilized from the religious principles that had been openly practiced in virtually every community of the nation. After the passage of the Equal Access Act, President Reagan explained how religion would now be given an equal footing with non-religion:

> In 1962, the Supreme Court in the New York prayer case banned the...saying of prayers. In 1963, the Court banned the reading of the Bible in our public schools. From that point on, the courts pushed the meaning of the ruling ever outward, so that now our children are not allowed voluntary prayer. We even had to pass a law--pass a special law in the Congress just a few weeks ago--to allow student prayer groups the same access to school rooms after classes that a Young Marxist Society, for example, would already enjoy with no opposition. [62]

This Court has long articulated the identical principle:

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62. Address by President Reagan, *reprinted in* Forerunner, Magazine, Dec. 1988.

> One of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects, but also between believers and nonbelievers. [63]
>
> This amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion. [64]
>
> The fullest realization of true religious liberty requires that government...effect no favoritism among sects or between religion and nonreligion...[65]

B. Failure to Uphold the Equal Access Act Will Establish Non-Religion as Dominant Over Religion

If this Court fails to uphold the Equal Access Act, it will have established non-religion over religion, having allowed 30 non-religious activities in the Westside schools to be voluntarily participated in by students, but prohibiting one solitary religious activity to be joined in by willing, desirous students. If the presence of such a club on campus constitutes a government endorsement of religion, then the absence of such clubs constitutes a government endorsement of non-religion.

Failure to uphold the right for the existence of this club, and others like it, will be construed as nothing but a repudiation of the principle articulated in *Zorach:*

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public

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63. *Walz v. Tax Commission,* 397 U.S. 664, 716 (1970).
64. *Epperson v. Arkansas,* 393 U.S. 97, 97 (1968).
65. *Walz v. Tax Commission,* 397 U.S. 664, 695 (1970).

service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe...we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence....We cannot read into the Bill of Rights such a philosophy of hostility to religion. [66]

C. Failure To Uphold the Equal Access Act Makes Students "Mere Creatures of the State"

To overturn the Equal Access Act will be to force students, because of compulsory attendance laws, into an educational system with non-religious and anti-religious ideas. Such a system represents the expressions of the religions of atheism and secular humanism, religions already recognized by this Court and by lower courts. [67] The absence of religion is acknowledged to be a religion. If the Court fails to uphold the Equal Access Act, the Court will communicate to students that traditional religion is not important; that it has no place in society; and that it is actually so dangerous that it must be prohibited from social gatherings and public settings. To clone students with that philosophy violates a fundamental principle long held by this Court:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children...The child is not the mere creature of the state... [68]

IV. CONCLUSION

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66. *Zorach v. Clauson*, 343 U.S. 306, 313, 314, 315 (1952).

67. *Torcaso v. Watkins*, 367 U.S. 488 (1963) (Secular Humanism recognized as a religion); *Grove v. Mead School District*, 753 F. 2d 1528 (9th Cir. 1985) (Secular Humanism reaffirmed as a religion); *Theriault v. Silber*, 547 F. 2d 1279 (5th Cir.) (atheism recognized as a religion for First Amendment purposes), *cert. denied*, 440 U.S. 917 (1977).

68. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

This Court's decisions prohibiting student access to religious teachings which foster traditional morality have been both a radical departure from its previous jurisprudence and a significant contributor to the grave plight in which America's youth now exist. The Equal Access Act once again places religion on equal footing with non-religion and reopens an avenue of access to important principles and teachings. Voluntary access to Bible and religious clubs does not violate the Establishment Clause, but is an important part of the fundamental freedom of religious exercise. Therefore, this Court must uphold the Equal Access Act.